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Interim Decision #2865

MATTER OF PENNER

In Visa Petitions Proceedings

HEL-N-3070

Decided by Commissioner March 1, 1982

(1) Occupations do not inherently qualify a beneficiary for classification under section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L). The Service looks for elements beyond general job tasks and duties; in other words, the specialized knowledge related to the proprietary interests of the business, its management, and concerned skills or knowledge not readily available in the job market.

(2) A beneficiary who possessed knowledge of the parts operation that was shared by no other employee of the company and who was essential to the operation of the parts distribution qualified as an "L" manager even though he had not served in an executive or managerial capacity previously. Matter of Vaillancourt, 13 I&N Dec. 654 (R.C. 1970) interpreted.

(3) A beneficiary who was an executive secretary in a multinational company and whose activities as a liaison with high government officials and business executives, as an intermediary with customers and government officials and as an advisor to a new vice president of the company was found to be a person of specialized knowledge. Matter of Raulin, 13 I&N Dec. 618 (R.C. 1970) interpreted.

(4) A beneficiary who was a sales manager was found to be a person of specialized knowledge in screening, recruiting, contracting for, and training sales personnel in the sale of cosmetics. Matter of LeBlanc, 13 I&N Dec. 816 (R.C. 1971) interpreted.

(5) The "L" provision of section 101(a)(15) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15), was not intended to alleviate or remedy a shortage of United States workers. The temporary worker provisions contained in section 101(a)(15)(H) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H), provide a basis for admission of workers for whom there is a shortage.

J21.11/2:

ON BEHALF OF PETITIONER: Charles C. Foster, Esquire
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This proceeding is before me under certification as provided for by 8 C.F.R. 103.4. The Regional Commissioner dismissed an appeal from the District Director's decision in which he held that the beneficiaries did not qualify as "L" intra-company transferees. The visa petitions were specifically denied on the grounds that the beneficiaries were not being transferred to the United States as employees of the petitioner's branch office, or of an affiliate or subsidiary, and on the ground that the beneficiaries were not persons of "specialized knowledge" under section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L).

The petitioner is a Canadian corporation engaged in the business of providing oil and gas drilling contracting services for the exploration and production of those natural resources. It has approximately 500 employees and gross annual revenue of $66 million (one supporting document states in excess of $6 million). The petitioner does not now have a place of business in Montana, although it apparently has a business office in Colorado and claims to have qualified to do business there. The five beneficiaries are Canadian citizens who have worked for the petitioner in Canada for more than the past year as a motorman, derrickman, driller, assistant driller, and electrician on the petitioner's drill rig crews in Canada. The petitioner claims it has entered into a contract (which it has not submitted for the record) to provide its drilling services in eastern Montana and seeks to transfer these beneficiaries to the United States as part of the rig crews for this job.

The major focus of this case is the finding that the beneficiaries are not persons of specialized knowledge. Section 101(a)(15)(L) provides that "L" status may be accorded to an alien who:

> has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the

> same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge. . . .

The Regional Commissioner found that the beneficiaries did not possess skills, knowledge or responsibilities "uniquely important" to the petitioner. He also found that to grant the "L" status would violate the Congressional intent that the "L" category be narrowly drawn.

House of Representatives Report No. 91-851, 91st. Congress, Session 2 (1970), contains the legislative history of Public Law 91-225 which established the L-1 nonimmigrant classification. The Report is silent on the subject of specialized knowledge. There were, however, attempts by the Chairman of the Subcommittee No. 1 of the House Judiciary Committee during the course of the hearings on the bill to have various witnesses define the level of skill necessary to qualify under the proposed "L" category (see: Hearings before Subcommittee No. 1 of the Committee on the Judiciary House of Representatives, Serial No. 91-9, pages 205-274). In response to the Chairman's questions, various witnesses responded that it was their understanding the legislation would deal with "high level" positions, "experts," "unique skills," that it would not include "lower categories" of workers, and that "they were not talking about skilled craft workers or people of that sort" (Hearings, id. at pages 210, 218, 223, 240, 248).

The petitioner asserts that the remarks of Congressman McEwen at the hearing on the bill are representative of the intent of Congress:

> Other statements by Congressman McEwen indicated that the bill would "alleviate that problem of restrictions now placed on the interchange of executive, managerial and skilled personnel of American and Canadian companies who seek to bring these employees to the facilities located in our country." He further stated, "prior to July 1968 a Canadian company with an American subsidiary could, within a reasonable time, transfer needed skilled production workers and management personnel from Canada to the U.S. . . ."

There are two major problems with both the petitioner's interpretation of and reliance on these remarks. First, Congressman McEwen was not a member of the Subcommittee, but only a witness. Secondly, his testimony touched on both the "L" legislation and a bill to amend the "H" temporary worker provisions. His comments as cited may or may not refer to "L" nonimmigrants. His individual views are ambiguous and not an expression of the drafting subcommittee. They are, therefore, not entitled to great weight in determining the Subcommittee's intent [see United States v. Matthews, 419 F.2d 1177, 1182 (D.C. Cir. 1969); D.C. Federation of Civic Associations, Inc. v. Volpe, 434 F.2d 436, 445 (D.C. Cir. 1970)].

The transcript of the hearings indicates that the subcommittee members themselves did not take exception to the definitions and prevailing thought supplied by the witnesses. To the extent that silence is acquiescence, the tenor of the testimony as a whole contradicts the interpretation presented by the petitioner in regard to Congressional intent.

The summary of the H.R. No. 91-851 which accompanied the bill echoes the limited definition favored by most subcommittee witnesses:

> Evidence submitted to the committee established that the number of temporary admissions under the proposed "L" category will not be large. The class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated and monitored by the Immigration and Naturalization Service. (H.R. No. 91-851, 1970 U.S. Code Cong. and Admin. News at 2754).

The report also states that the purpose of the L-1 provision is to facilitate the admission of "key personnel" and "managerial personnel." A broad definition which would include skilled workers and technicians was not discussed, thus the limited legislative history available therefore indicates that an expansive reading of the "specialized knowledge" provision is not warranted.

The petitioner contends that the Regional Commissioner's decision narrowly defining "specialized knowledge" is contrary to prior Service and Board of Immigration Appeals rulings. This is not correct. Precedent decisions issued around 1970 form the bulk of the decisions issued on "L" visas. Although the decisions appear fairly broad in their implications, none of them stand specifically for the proposition that skilled workers are persons of specialized knowledge. In Matter of Vaillancourt, 13 I&N Dec. 654 (R.C. 1970), a petition was submitted on behalf of a man who would serve as a parts manager for the entire United States, for a company with sales in excess of one billion dollars. The issue presented in that case was whether the beneficiary could qualify as an "L" manager if he had not served in an executive or managerial capacity previously. The Regional Commissioner concluded that the beneficiary's prior work history qualified him as a person of specialized knowledge. The decision indicates quite clearly that the beneficiary possessed knowledge of the parts operation that was shared by no other employee of the company and that the beneficiary was essential to the operation of the parts distribution system.

In a second case cited by the petitioner, Matter of Raulin, 13 I&N Dec. 618 (R.C. 1970), the beneficiary was an executive secretary in a multinational company. The petition was approved, as she was found to be a person of specialized knowledge. The inquiry focused on her activities as a liaison with "high" government officials and business executives, as an intermediary with customers and government officials and as an advisor to a new vice president of the company. The decision made it clear that she was valued for her knowledge.

In Matter of LeBlanc, 13 I&N Dec. 816 (R.C. 1971), a petition was approved on behalf of a sales manager. Although the decision mainly discussed the question of whether or not a "branch office" existed in the United States, the beneficiary was found to be a person of specialized knowledge in screening, recruiting, contracting for, and training sales personnel in the sale of cosmetics.

In a more recent decision of June 19, 1981, the Commissioner of Immigration and Naturalization stated that the LeBlanc and Raulin decisions did not find that the occupations inherently qualified the beneficiaries for the classification sought. The Service looked for elements beyond general job tasks and duties. Both decisions rested on a finding that the beneficiaries had essential knowledge of the business firm's product or service, management operations, decision making process, or similar elements. In other words, the specialized knowledge related to the proprietary interests of the business, its management, and concerned skills or knowledge not readily available in the job market, Matter of Colley, et al., Interim Decision 2881 (Comm. 1981).

The precedents, therefore, stand for the proposition that petitions may be approved for persons with specialized knowledge, not for skilled workers. Although Raulin was a secretary, her petition was approved for reasons other than her basic secretarial skills. Vaillancourt received a visa because he would direct the nationwide parts operation, not because he was a "stock clerk" as the petitioner here contends. LeBlanc's petition was approved because he could recruit and train persons, not because he could sell cosmetics. The contemporary work place is, of course, increasingly complex and most employees possess varying levels of technical and specialized skills which have been acquired by both on-the-job experience and by training courses. However, in view of the House Report, it cannot be concluded that all employees with any level of specialized knowledge or performing highly technical duties are eligible for classification as intra-company transferees. Such a conclusion would permit extremely large numbers of persons to qualify for the "L-1" visa. The House Report indicates that the employee must be a "key" person and "the numbers will not be large."

A distinction can be made between the person whose skills and knowledge enable him or her to produce a product through physical or skilled labor and the person who is to be employed primarily for his ability to carry out a key process or function which is important or essential to the business firm's operation. Thus, in Matter of Colley, et al., supra, the Commissioner authorized L-1 classification to five alien beneficiaries who possessed knowledge of the uniquely complex equipment and the particular techniques used by the petitioner in map surveys and which were proprietary to the petitioner.

A review of the record of this proceeding reflects only that the beneficiaries are highly skilled workers who will be performing labor on drilling rigs. These occupations are technical, but not unique in the industry at large. The United States Department of Labor estimated that there were more than 650,000 gas and petroleum wells in the United States in 1978 (Occupational Outlook Handbook, 1980, Bureau of Labor Statistics, pg. 498). Statistics contained in the record show that in June 1981, there were over 4,000 active rotary oil and gas drilling rigs operating in the United States. A typical rotary drilling crew consists of four or five workers. Because drilling rigs are operated 24 hours a day, 7 days a week, several crews are needed for each rig.

The petitioner states that these beneficiaries will work on "electrical/diesel" powered drilling rigs and that only 5% of the rigs now operating in the United States are so powered. However, I see nothing in the record which distinguishes these workers from many others involved in the industry. New technology and different equipment are routinely introduced into the American workplace. In the absence of evidence that there is significant proprietary knowledge involved or that the know-how or knowledge held by these beneficiaries is unique, I am unable to conclude that the petitioner has demonstrated that the beneficiaries have the specialized knowledge contemplated under the statute. The petitioner's contention that a shortage of U.S. rig workers exists is not material in this proceedings. The "L" provision was not intended to alleviate or remedy a shortage of United States workers. The temporary worker provisions contained in section 101(a)(15)(H) of the Act, provide a basis for admission of workers for whom there is a shortage.

A second basis for denying the petitions was the Regional Commissioner's finding that the beneficiaries would be employed directly in the United States by a foreign company and that the beneficiaries would not be controlled in any way by the foreign company's United States office located in Denver, Colorado. I agree with the Regional Commissioner that if the beneficiaries will not in fact have any employment relationship to the Denver office, then it would appear that they are not in fact intra company transferees. The second clause of "L" provision provides that the employee must be coming to render his services to the "same employer or a subsidiary or affiliate thereof." In this instance, the petitioner does not contend that the oil rig in Montana is a subsidiary or affiliate of the petitioner. Arguably, the beneficiaries are coming to work for the "same employer," the petitioner. This conclusion, however could lead to an anomalous result: virtually any foreign based business would be able to use the "L" visa category to bring to the United States any number of its employees whether or not a business entity existed or was being established in this country. For instance, a foreign-based construction company could contract to build a factory, and then send a work-force to build the facilities, thereby depriving American workers of employment. This result would not be consistent with the legislative history of the "L" provision. The term "same employer" as used in the second clause of the "L-1" provision should be understood to mean "parent company." This latter term is used in the House Report to the bill, in phrasing such as "parent companies, branches, or affiliates," "by a company affiliated with the parent, subsidiary, or branch located in the United States."

The petitioner has submitted additional information to the effect that an office is being constructed in Willston, North Dakota which will manage and control the petitioner's United States operations. This development potentially could remove the Regional Commissioner's second reason for denying the petitions. Nonetheless, the petitioner has failed to establish that the beneficiaries are entitled to classification under section 101(a)(15)(L) of the Immigration and Nationality Act.

ORDER: The visa petitions are denied.

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MATTER OF M/V "SOLEMN JUDGE"

In Fine Proceedings

MIA 10/12.1785

Decided by Board January 21, 1982

(1) In the absence of a showing of "affirmative misconduct" on the part of a government agent, the Board of Immigration Appeals decided not to meet the issue of whether the doctrine of estoppel can be applied against the government; "affirmative misconduct" was not shown by the fact that former President Jimmy Carter issued Presidential Determination No. 80-16 on April 14, 1980, or his "open hearts and open arms" speech on May 5, 1980; likewise, "affirmative misconduct" was not demonstrated by the absence of a warning to the carrier by the United States Coast Guard or the United States Customs Service concerning the subject of administrative fines for bringing undocumented aliens to the United States or by the fact that the Customs Service issued the carrier clearance to travel to Cuba.

(2) The Attorney General has delegated to the Commissioner of the Immigration and Naturalization Service the authority to enforce the provisions of the Immigration and Nationality Act and the Commissioner, through his delegate, the District Director, properly exercised that authority under the provisions of section 273(b) of the Act.

(3) The carrier became liable to fines under the provisions of section 273 of the Act by transporting undocumented alien passengers to the United States and, therefore, cannot claim exemption from liability merely by delivering his passengers to the Immigration and Naturalization Service for inspection upon arrival in the United States.

(4) The failure of the Immigration and Naturalization Service to respond to the request of the carrier to provide him with addresses of the undocumented alien passengers that he brought to the United States is not a denial of due process of law.

J-21.11/2

(5) The District Director's decision to impose or not to impose fines for violations of section 273 of the Act involves the exercise of prosecutorial discretion which is not reviewable by the Board of Immigration Appeals.

(6) Remission of fines under section 273(c) of the Act is not warranted because the carrier failed to exercise reasonable diligence in ascertaining and complying with the requirements of the law for bringing alien passengers to the United States.

(7) The defense of duress is not available to the carrier seeking remission of fines under section 273(c) of the Act for the reasons that his objective in bringing immigrants to the United States who did not have proper documentation was contrary to the law; that his action in doing so was not prudent; and that he, in effect, usurped the authority of the Attorney General by precluding the government from screening those immigrants who were inadmissible under United States law.

In re: M/V "Solemn Judge", which arrived at Key West, Florida, from Cuba on May 25, 1980. Alien passengers involved: Carlos Gonzalez-Guiu, Elena Hernandez-Guiu, Myrna Martinez-Martinez, Isriano Uicario-Duran, Michel Menez-Segredo, Gilberto Sanchez, et al.

BASIS FOR FINE: Act of 1952 - Sec. 273 [8 U.S.C. 1323] - Bringing to the United States immigrants not in possession of unexpired visas

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BY: Milhollan, Chairman; Maniatis, Maguire, Morris, and Vacca, Board Members

On February 9, 1981, the District Director in Miami imposed administrative fines totalling $190,000 upon Nevin Stewart, Jr., captain/owner of the M/V Solemn Judge (hereinafter referenced as the "carrier"), for 190 violations of section 273(a) of the Immigration and Nationality Act, 8 U.S.C. 1323(a). 1/ The District Director also determined that the carrier had not met the requirements for remission of the fines. The carrier has appealed. The appeal will be dismissed.

The record reflects that the carrier chartered his vessel for $1,000 per day to go to Cuba for the purpose of picking up 54 Cuban nationals and returning with them to the United States. It further reflects that he departed from the United States for Cuba on April 29, 1980, and that he returned from Cuba to Key West, Florida, on May 25, 1980. Upon his arrival in the United States, he was served with a Notice of Intention to Fine charging him with having brought to the United States 191 Cuban nationals who did not have valid unexpired visas for entry. The carrier filed a written defense and appeared for an interview on September 15, 1980. An immigration officer found the carrier subject to fines under section 273 of the Act for 190 violations. He recommended that the District Director impose the statutory $1,000 per alien fine with respect to all 190 violations. The District Director accepted that recommendation.

The statute under which the fines were imposed in this case is clear. Section 273(a) of the Act provides: "It shall be unlawful for any person . . . to bring to the United States from any place outside thereof . . . any alien who does not have an unexpired visa, if a visa was required under this Act or regulations issued thereunder." Section 273(b) provides that the fine for each

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1/ This case is one of approximately 38 cases with respect to which the legal issues were consolidated for oral argument on August 24, 1981.

violation of subsection (a) shall be $1,000. Section 273(c) provides: "Such sums shall not be remitted or refunded, unless it appears to the satisfaction of the Attorney General that such person . . . prior to departure of the vessel or aircraft from the last port outside of the United States, did not know, and could not have ascertained by the exercise of reasonable diligence, that the individual transported was an alien and that a visa was required."

It is important to note that fines under section 273 of the Act are imposed without regard to the intentions of the carrier. It is not necessary for there to be a willful disregard of United States law. Under section 273 the carrier becomes, in effect, an insurer that its passengers have met the visa requirements of the Act. Any bringing to the United States of an alien who does not meet these requirements incurs liability. Matter of M/V "Emma", Interim Decision 2862 (BIA 1981); Matter of Swissair, "Flight #164", 15 I&N Dec. 111 (BIA 1974). Further, there is no provision for mitigation of such fines. Section 273(c) permits remission (forgiveness in full) in only one circumstance: where it appears that prior to the alien's departure from the last port outside of the United States, the carrier did not know, and could not have ascertained by the exercise of reasonable diligence, that the individual transported was an alien and that a visa was required. What constitutes "reasonable diligence" varies according to the circumstances of the case. Matter of S.S. "Florida", 3 I&N Dec. 111 (BIA 1947, 1948; A.G. 1948).

The carrier has raised a number of contentions in these proceedings. We state and address them in turn.

The carrier argues that the government should be estopped from imposing fines in this case because it encouraged him to go to Cuba and did not warn him that he was subject to fines if he brought undocumented Cuban nationals to the United States. The carrier contends that he went to Cuba after former President Carter determined on April 14, 1980, 2/ that persons who had taken sanctuary in the

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2/ The carrier refers to Presidential Determination No. 80-16 of April 14, 1980. See 45 Fed. Reg. 28079 (April 28, 1980).

Peruvian Embassy in Havana and who otherwise qualified could be considered refugees, that an unforseen emergency refugee situation existed, and that the admission into the United States of 25 to 33 percent of these refugees up to a maximum of 3,500 refugees was justified by grave humanitarian concerns. The carrier also contends that he went to Cuba pursuant to former President Carter's "open hearts and open arms" policy. He further alleges that prior to his vessel's departure for Cuba, he went to a United States Customs Service office, advised the Customs Service of the nature of his voyage, paid a fee, and received a "Clearance of Vessel to a Foreign Port" authorizing him to travel to Cuba. The carrier adds that the Customs Service did not warn him that he was subject to a fine for transporting "refugees" to the United States.

The carrier's argument that the government should be estopped from imposing fines in this case is without merit. It was once thought to be well-settled that the doctrine of estoppel could not be applied against the government. See Utah Power and Light Company v. United States, 243 U.S. 389 (1917); Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380 (1947). However, in two nationality cases, INS v. Hibi, 414 U.S. 5 (1973) and Montana v. Kennedy, 366 U.S. 308 (1961), the United States Supreme Court opened the possibility that the doctrine of estoppel might be applied against the government in a case where it is established that its agents engaged in "affirmative misconduct." Since these cases were decided, lower Federal courts have found "affirmative misconduct" and applied estoppel against the government in a number of cases.3/ However, the Supreme Court has not yet decided whether even "affirmative misconduct" is sufficient to estop the government. Schweiker v. Hansen, 101 S. Ct. 1468 (1981), petition for rehearing denied, 101 S. Ct. 3023 (1981) (involving an application for Social Security benefits). See also INS v. Miranda, 102 S. Ct. 81 (1981), (judgment vacated and case remanded to Court of Appeals for further consideration in light of Schweiker v. Hansen, supra).

3/ See discussion in Judge Friendly's dissent in Hansen v. Harris, 619 F.2d 942 (2 Cir. 1980).

We need not face the issues of whether the doctrine of estoppel can be applied against the government in this case, or whether we have the authority to apply that doctrine, because we find that this carrier has not established any "affirmative misconduct" such as might warrant the application of that doctrine. We will consider the factors alleged as "affirmative misconduct" seriatim.

First, former President Carter's Determination of April 14, 1980, did not authorize private boat owners to bring undocumented Cuban nationals to the United States. The Determination was not even directed at private citizens. It was simply the means through which the President moved to accept a limited number of Cuban nationals into the United States in accordance with United States law (section 207 of the Act).

Second, the carrier has not established that there was any "open hearts and open arms" policy at the time of his departure from the United States. Former President Carter referred to "open hearts and open arms" when addressing the League of Women Voters in Washington, D.C., on May 5, 1980. See Weekly Compilation of Presidential Documents, Monday, May 12, 1980, page 834. However, as this carrier departed from the United States on April 29, 1980, he could not possibly have relied upon that statement in deciding to go to Cuba. In any event, there was nothing in that statement which could reasonably have been construed as waiving the visa requirements of the Act or authorizing this carrier to bring undocumented Cuban nationals to the United States. See Matter of M/V "Runaway", Interim Decision 2883 (BIA 1981).

Third, the carrier has not established that either the United States Coast Guard or the United States Customs Service had any legal duty to warn him that he would be subject to fines if he brought undocumented Cuban nationals to the United States. Compare Corniel-Rodriguez v. INS, 532 F.2d 301 (2 Cir. 1976).

Finally, we find no affirmative misconduct in the fact that the United States Customs Service cleared the carrier's vessel for travel to Cuba. The United States Attorney General has rendered the opinion that such clearance must be granted in the absence of statutory authority for denying clearance. See 46 U.S.C. 91 and 29 Op. Atty. Gen. 364 (1912); see also 34 Op. Atty. Gen. 244 (1923). The carrier has not established any statutory authority under which the Customs Service might properly have denied clearance in this case. Furthermore, we see no reason why the carrier should have been misled by the clearance. The clearance document in this case is entitled "CLEARANCE OF VESSEL TO A FOREIGN PORT." This document does not mention aliens, refugees, visas, or return of the vessel to the United States. The document cleared the carrier's vessel for travel to a foreign port: it did not purport to authorize the vessel's return with undocumented aliens.

Thus, we conclude that the carrier has not established that the government engaged in any "affirmative misconduct" such as might warrant application of the doctrine of estoppel. Compare the facts in this case with those of Schweiker v. Hansen, supra; INS v. Hibi, supra (note especially the dissent); and Montana v. Kennedy, supra.

The carrier argues that he is not liable for fines in this case because 138 of his passengers were forced upon his boat by Cuban authorities and brought to the United States under duress. We have previously rejected this argument on the ground that section 273 of the Act imposes strict liability. Matter of M/V "Emma", supra. Later in this order, we will consider the defense of duress in connection with the carrier's application for remission of the fines.

The carrier also contends that section 273(b) requires a decision by the Attorney General before a fine can be imposed under this section. We find this contention to be without merit. The Attorney General has delegated his authority to make such determinations to the Commissioner of the Immigration and Naturalization Service and the Commissioner, through his delegate, the District Director, has properly exercised it in this case. See 8 C.F.R. Part 100. That the Attorney General can delegate his authority in this manner has been recognized by the United States Supreme Court. Jay v. Boyd, 351 U.S. 345 (1956); Accardi v. Shaughnessy, 347 U.S. 260 (1954).

The carrier contends that he is not liable for fines in this case because his passengers were not brought to the United States within the meaning of section 273 of the Act because they were delivered to the Immigration and Naturalization Service at Key West, Florida. We find this contention to be without merit. The carrier violated section 273 of the Act by transporting his undocumented passengers to the United States. Peninsular and Occidental Steamship Company v. United States, 242 F.2d 639 (5 Cir. 1957); Matter of M/V "Runaway", supra; Matter of Aircraft "VT-DJK", 12 I&N Dec. 267 (BIA 1967); Matter of Plane "F-DHSQ", 9 I&N Dec. 595 (BIA 1962). The carrier is not relieved from liability merely because he presented his passengers for inspection: that was clearly his duty under section 271 of the Act, and he would have been liable for additional fines under section 271 had he allowed his passengers to land at a time or place other than as directed by an immigration officer. Further, had the carrier attempted to discharge his passengers in such a manner as to have permitted them to avoid inspection by an immigration officer, he would have subjected himself to potential criminal liability under section 274 of the Act.

The carrier's argument that his passengers were not required to have visas because that requirement was waived by the Refugee Act of 1980 is without merit. We have previously held that Cuban nationals who came to the United States in the "Freedom Flotilla" of 1980 without first having filed Form I-590 (Registration for Classification as a Refugee) and having received approval for admission as refugees under section 207 of the Act are not exempt from the Act's visa requirements by virtue of the Refugee Act of 1980. Matter of M/V "Runaway", supra. This carrier has not alleged that any of his passengers filed Form I-590 before departing Cuba.

The carrier also contends that he has been denied due process of law in these proceedings because the government has failed to honor his request for the names and addresses of all the passengers the carrier brought to the United States. He argues that he needs this information so he can interview these people and determine whether they were aliens and whether any of them had visas. We find that the procedure below was in compliance with 8 C.F.R. Part 280. We note that all relevant parties were provided copies of the passenger list. Therefore, the only information that the carrier asked for but did not receive was the addresses of his passengers. We are aware of no requirement for the Service to gather and provide this information to a carrier upon request. There is no such requirement in 8 C.F.R. Part 280. We also note that the carrier does not contend that any of his passengers were not aliens or that any one of them had a visa. He claims only that he does not know. However, he was required by section 273 of the Act to obtain this information with respect to each passenger before bringing the passenger to the United States. The record contains evidence reflecting that each of the carrier's passenger was an alien and that each arrived in the United States without a visa. Each passenger was inspected upon arrival in the United States and a Form I-94 was completed. These Forms I-94 indicate the individual's name; country of citizenship; passport or alien registration number, if any; the airline and flight number or vessel of arrival; the month, day and year of birth; country of birth; where any visa was issued; the month, day, and year the visa was issued; and the date of arrival in the United States. In this case, the Forms I-94 indicate that the carrier's passengers were citizens of Cuba and that none of them had a visa at the time of arrival in the United States. See Matter of Swissair, "Flight SR 168", 15 I&N Dec. 372 (BIA 1975).

The carrier's contention that these proceedings are invalid because of selective enforcement of the law by the Service is not established in this record. The carrier has alleged that the Service arbitrarily served Notices of Intention to Fine on some vessels and failed to serve such notices upon other vessels. However, there is no evidence in this record to support the carrier's allegation. Further, we have seen no evidence of the type of selective enforcement that the carrier alleges in any of the other cases which we have reviewed.

The carrier also contends that the District Director abused his discretion in finding that the carrier's trip to Cuba was "profit-motivated", and that he improperly refused to exercise his discretion and cancel a portion of the fines in this case. This allegation does not raise an issue which is within our power to review. We are aware that the District Director followed a policy of imposing fines only for the number of aliens that the carrier originally intended to bring to the United States unless he found that the carrier's trip was profit-motivated or that the carrier left the United States after it had become common knowledge that Cuban authorities were forcing passengers upon the vessels. However, the District Director used this policy to guide himself in the exercise of his prosecutorial discretion, a matter over which we have no power of review. Cf. (deportation cases) Matter of Ramirez, Interim Decision 2820 (BIA 1980); Matter of Marin, 16 I&N Dec. 581 (BIA 1978); Matter of Geronimo, 13 I&N Dec. 680 (BIA 1971).

In this case, the carrier has acknowledged that he brought approximately 190 undocumented Cuban nationals to the United States. The record contains 190 Forms I-94, which indicate that the carrier brought 190 Cuban nationals to the United States, none of whom was in possession of proper documents. Therefore, we conclude that 190 violations of section 273 have been established and that the carrier is liable for fines in the amount of $190,000.

The remaining issue to be considered is whether the carrier is entitled to remission under section 273(c) of the Act. Section 273(c) precludes remission of the fines "unless it appears to the satisfaction of the Attorney General that such person, and the owner, master, commanding officer, agent, charterer, and consignee of the vessel or aircraft, prior to departure of the vessel or aircraft from the last port outside the United States, did not know, and could not have ascertained by the exercise of reasonable diligence, that the individual transported was an alien and that a visa was required." The carrier argues that he should be found to have exercised reasonable diligence under this section because he obtained a clearance from the United States Customs Service for his vessel to travel to Cuba and because 138 of his 190 passengers were forced upon his vessel by Cuban authorities and brought to the United States under duress. 4/ The carrier alleges that after

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4/ Fifty-two of his passengers were aliens whom he originally intended to bring to the United States.

former President Carter's statement of May 14, 1980, urging boat owners to return to the United States without passengers, that he attempted to do so but was precluded from returning without passengers by Cuban gunboats and by his 29 Cuban-American passengers who did not want to return without their relatives. The carrier also alleges that he twice called and advised the United States Coast Guard of his situation and requested advice. He states that in each instance he was advised that the Coast Guard could not come into Mariel harbor to help him and that he should do whatever was necessary to preserve life and for the safety of his vessel.

In Matter of M/V "Emma", supra, we rejected a "duress" argument similar to the present one. In Emma we acknowledged that what constitutes reasonable diligence varies with the circumstances of each case. Matter of S.S. Florida, supra. We held that under the circumstances of the Freedom Flotilla of 1980, a carrier would not be found to have exercised reasonable diligence within the meaning of section 273 unless he exerted a reasonable effort to ascertain the requirements of the law before he departed for Cuba, and he exercised reasonable prudence in determining to go to Cuba. In Emma, supra, we found the carrier had failed to do either. We reach the same conclusion here.

The carrier presents the argument of duress to establish compliance with the reasonable diligence standard of section 273(c) on the theory that at the time the statute requires that reasonable diligence be exercised, the carrier had no opportunity to do so because his only viable option was to do as directed by Cuban authorities. We reject this argument because we find that the carrier subjected himself to the jurisdiction of Cuban authorities in pursuit of an objective contrary to United States law.

We recognize that the circumstances of the Freedom Flotilla are different from our reported cases in many ways, especially in that these carriers are not usually commercial carriers, but are fishermen, pleasure boat operators, and even some people with no connection to the sea. The carrier argues that this distinction militates toward remission of the fines on the theory that he should not be expected to know the requirements for bringing immigrants to the United States. However, we view the situation differently. Since this carrier was not a commercial carrier, he was obligated to make appropriate inquiries and determine what the legal requirements were before undertaking to bring aliens to the United States. This rationale underlies our holding that reasonable diligence under these circumstances requires that the carrier make a reasonable effort to ascertain the requirements for bringing aliens to the United States before departing for Cuba.

The fact that this carrier was not a commercial carrier militates against accepting his argument of duress in another way. A commercial carrier coerced into bringing undocumented aliens to the United States on a regularly scheduled trip from Europe, for example, could not be faulted for having his vessel in Europe for routine business operations. This carrier, however, was not routinely in Cuba or there on legitimate business. He was there for the sole purpose of bringing Cuban immigrants to the United States, an objective which was unlawful inasmuch as the passengers he intended to bring to the United States needed, but did not have visas.

We find that the carrier's inquiry to the United States Customs Service which resulted in a "Clearance of Vessel to a Foreign Port" being issued to him does not constitute a reasonable effort to ascertain the requirements of the law. What the carrier wanted to do was to bring Cuban immigrants to the United States. Therefore, we think he should have inquired of the Immigration and Naturalization Service or some other immigration authority about the legality of his proposed venture. We are not satisfied that the United States Customs Service is such an authority.

We also find that the carrier's decision to bring Cuban nationals to the United States was not prudent. We recognize that there was much confusion both in South Florida and Cuba at the time of the boatlift. However, rather than justifying or excusing this carrier's action, we think that that confusion should have provoked caution, both for reasons of personal safety and because of potential civil and criminal liability. Instead of proceeding cautiously, the carrier gambled that what he was about to do was legally permissible or that he would not be punished for it in any event. While former President Carter moved pursuant to section 207 of the Act to authorize the lawful admission of some 3,500 Cuban refugees, 5/ private boat owners, including this carrier, took it upon themselves to bring to the United States some 125,000 Cuban nationals. In so doing, they usurped the authority given the Attorney General by law, subverted the Congressional purpose manifested in section 207 of the Refugee Act of 1980 to limit the number of refugees admitted to the United States, and precluded the government from screening out those inadmissible under our law. They brought immediate relatives and hardened criminals without distinction.

In summary, we conclude that this carrier went to Cuba for the purpose of bringing Cuban nationals to the United States; that he departed on his mission without having made a reasonable effort to determine the legal requirements for bringing immigrants to the United States; and that he acted imprudently in subjecting himself and his vessel to the jurisdiction of Cuban authorities. Under these circumstances, we do not believe the carrier is entitled to remission under section 273(c) of the Act merely because the Cuban government and/or the party that chartered his boat refused to allow him to change his mind after he arrived in Cuba and required him to accept on his vessel undocumented passengers in addition to those he had originally intended to bring to the United States. We, therefore, reject the carrier's defense of duress and find that remission of the fines is not warranted.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

5/ *See* note 2, *supra*.

MATTER OF HANN

In Visa Petition Proceedings

A-21504220

Decided by Board February 3, 1982

(1) The law of the Dominican Republic does not preclude a nonresident from obtaining a divorce for cause in the Dominican Republic.

(2) Article 17 of the Law on Divorce 1306-bis, Civil Code of the Dominican Republic, does not require the party who obtains a divorce for cause to appear "in person" to have the divorce pronounced and registered. Matter of Valerio, 15 I&N Dec. 659 (BIA 1976); Matter of Gonzalez, 16 I&N Dec. 178 (BIA 1977); and Matter of Lucero, 16 I&N Dec. 674 (BIA 1979), modified.

(3) The visa petition was properly denied on the ground that the petitioner's marriage to the beneficiary is invalid, i.e., at the time it was entered into, the petitioner's divorce had not yet become final and he was not free to contract another marriage.

ON BEHALF OF PETITIONER:

Gene C. Lange, Esquire
Ragan & Mason
The Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006

BY: Milhollan, Chairman; Maniatis, Maguire, Morris, and Vacca, Board Members

In a decision dated March 27, 1981, the Officer-in-Charge, Hong Kong, on his own motion reversed his prior decision dated May 5, 1980, and approved a visa petition filed to accord the beneficiary immediate relative status as the spouse of a United States citizen under section 201(b) of the Immigration and Nationality Act, 8 U.S.C. 1151(b). The Officer-in-Charge certified his decision to the Board for review. In an order dated May 19, 1981, we remanded the case to the Officer-in-Charge for further proceedings. On September 23, 1981, the Officer-in-Charge entered a new decision denying the petition and certified it to the Board for review. This latest decision of the Officer-in-Charge will be affirmed.

The petitioner is an 80-year-old native and citizen of the United States, currently residing in Japan. The beneficiary is a 58-year-old native and citizen of Japan. The petitioner married the beneficiary in Japan on January 25, 1980. That same day he filed a visa petition in her behalf. In support of his petition, the petitioner submitted a copy of a divorce judgment entered on December 7, 1979, at San Cristobal, Dominican Republic, purporting to dissolve the petitioner's prior marriage to Ellen Jane Hann on the ground of incompatibility of character. The divorce was pronounced by an official of the Civil Registry on February 9, 1980.

In our prior order in this case, Matter of Hann, Interim Decision 2867 (BIA 1981), we remanded the case to the Officer-in-Charge for resolution of three issues:

> (1) Whether Dominican law allows nonresidents to obtain divorces for cause in the Dominican Republic;
>
> (2) Whether Article 17, Law 1306-bis, Civil Code of the Dominican Republic, requires the party who obtains a divorce for cause to appear "in person" before an official of the Civil Registry to have the divorce pronounced and registered; and
>
> (3) Whether Japan, the country of the petitioner's residence at the time of his divorce and the place of celebration of his marriage to the beneficiary, would recognize his Dominican divorce.

In addressing these issues, the Officer-in-Charge relied upon a report provided him by the Hispanic Law Division of the Library of Congress. With respect to the first issue, the report concludes: "(W)hen a foreigner obtains a divorce on any of the grounds authorized by Article 2 of Law 1306-bis (for cause) . . . there is no doubt that such a divorce decree would be valid in the Dominican Republic."

With respect to the second issue, the Library of Congress report states: "(A)n examination of the Spanish text of the provision of Article 17 of the Law on Divorce 1306-bis of 1937, shows that the personal appearance of the party in question is not required. Therefore, the translation of Article 17 quoted in the letter of inquiry should be corrected by eliminating the words "in person."

With respect to the third issue, the report from the Library of Congress states that there are no court decisions relating to the validity of foreign divorces under the law of Japan and that scholarly opinion on the subject is divided. However, the report notes that if the petitioner and beneficiary registered their marriage in Japan on January 25, 1980, before the petitioner's divorce became final on February 9, 1980, that the marriage would be bigamous. The report further states that Article 732 of the Civil Code of Japan provides that "a person who has a spouse may not effect an additional marriage." The report also notes that bigamous marriages are prohibited under Article 184 of the Penal Code of Japan.

The Officer-in-Charge entered his decision adopting the conclusions of the Library of Congress with respect to the first two issues. He denied the visa petition on the ground that the petitioner was not free to marry the beneficiary on January 25, 1980, because the divorce terminating his prior marriage did not become final until February 9, 1980. By Notice of Certification dated September 23, 1981, the Officer-in-Charge provided counsel for the petitioner a copy of his decision and advised him that the decision had been certified to the Board for review. The Notice of Certification also advised the petitioner that he had 10 days within which to submit a brief or other written statement for consideration by the Board. He was also advised that if he wished to present oral argument before the Board, he should promptly request oral argument by a letter to the Board. The petitioner did not request oral argument before the Board and the record file does not contain a brief or other statement in response to the decision of the Officer-in-Charge or the Notice of Certification.

In visa petition proceedings, the burden is upon the petitioner to establish eligibility for the benefits sought. Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966). A petitioner who relies on foreign law to establish eligibility for an immigration benefit must prove that law as if it were a question of fact. Matter of Annang, 14 I&N Dec. 502 (BIA 1973).

The only evidence of record regarding the issues of foreign law critical to the decision in this case is the report prepared by the Library of Congress. Although he has had ample opportunity to do so, the petitioner has not submitted any evidence regarding these issues. Neither has he in any manner disputed the report submitted by the Library of Congress. Therefore, on the basis of the evidence before us we conclude:

(1) That the law of the Dominican Republic does not preclude a nonresident from obtaining a divorce for cause in the Dominican Republic.

(2) That Article 17 of the Law on Divorce 1306-bis, Civil Code of the Dominican Republic, does not require the party who obtains a divorce for cause to appear "in person" to have the divorce pronounced and registered. Therefore, as the translation of Article 17 which we relied upon in Matter of Valerio, 15 I&N Dec. 659 (BIA 1976); Matter of Gonzalez, 16 I&N Dec. 178 (BIA 1977); and Matter of Lucero, 16 I&N Dec. 674 (BIA 1979), was an erroneous translation, these cases are hereby modified insofar as they hold that one who

obtains a divorce decree for cause in the Dominican Republic must appear "in person" in order to have the divorce decree pronounced.

(3) That the visa petition in this case was properly denied on the ground that the petitioner's marriage to the beneficiary is invalid because at the time it was entered into, the petitioner's divorce had not yet become final and he was not free to contract another marriage. Matter of Valerio, supra.

Accordingly, the following order will be entered.

ORDER: The decision of the Officer-in-Charge is affirmed and the visa petition is denied.

MATTER OF SAUCEDA

In Visa Petition Proceedings

A-20724469

Decided by Board February 4, 1982

(1) At the time of the petitioner's purported adoption of the beneficiary, Article 400 of the Civil Code of Tamaulipas, Mexico, provided for adoption only by persons "who have no descendants."

(2) The United States citizen petitioner, who had a living natural child at the time of the beneficiary's adoption, failed to show that the adoption in Tamaulipas, Mexico, was in compliance with the Civil Code of that state, and, hence, did not establish that beneficiary qualified as a child of petitioner under section 101(b)(1)(E) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(E). Matter of Espinosa, 16 I&N Dec. 199 (BIA 1977), and Mila v. District Director, 494 F.Supp. 998 (D. Utah 1980), distinguished.

ON BEHALF OF PETITIONER: Alma L. Lopez, Esquire
809 South Saint Mary's Street
San Antonio, Texas 78205

BY: Milhollan, Chairman; Maniatis, Maguire, Morris, and Vacca, Board Members

The United States citizen petitioner has moved that we reopen the above captioned case in order to reconsider our decision of May 12, 1975, in which we affirmed the decision of the District Director and denied the petitioner's visa petition application. The motion will be denied.

In a per curiam order dated May 12, 1975, the Board denied the petitioner's appeal, citing Matter of Allmon, 15 I&N Dec. 165 (BIA 1975). In that case the beneficiary was adopted in Matamoras, Tamaulipas, Mexico. Article 400 of the Civil Code of Tamaulipas provides for adoption only by persons "who have no descendants." The petitioner had two natural children. Therefore, the adoption was not valid and the petition was properly denied because the beneficiary did not qualify as the child of the petitioner under section 101(b)(1)(E) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(E).

In support of his present motion, the petitioner makes the following contentions: (1) That recurrent trends in Mexican Civil Law no longer consider the "no descendants" requirement mandatory for a valid adoption. The petitioner points out that the Mexican State of Coahuila in its Civil Code, contained a section which, in pertinent part, was exactly the same as Section 400 of the Tamaulipas Code and that in 1977, the Civil Code of Coahuila discarded the "no descendants" requirement at the time of adoption. (2) That the Mexican adoption court specifically declared that all "requisite legal demands were complied with, by the proper procedure. . . ." The petitioner argues that the Mexican Court, "waived" the "no-descendant" requirement and proceeded to declare the adoption in full compliance with the law. (3) That the Board's decision in Matter of Espinosa, 16 I&N Dec. 199 (BIA 1977), "clearly indicated that the District Director could not declare invalid the action of a Mexican Court, merely because of an alleged non-compliance with Mexican law." The petitioner contends that the District Director's declaration of "invalidity" was improper and submits that "Allmon can no longer be considered as a viable precedent and the decision in the case at hand, should be considered in light of Espinoza [sic]." (4) That Mila v. District Director, 494 F.Supp. 998 (D. Utah 1980), concludes that the Service and Board have been unduly restrictive. Petitioner contends that if a bona fide parent-child relationship exists, then the important inquiry must be the reality of the relationship and not the manner in which it arises. (5) That the equitable doctrine of adoption by estoppel should be applied in this case. Petitioner cites section 16.01 of the Texas family code. (6) Petitioner argues that the beneficiary is eligible for "discretionary relief available pursuant to section 244(a) and (d) of the Act, 8 U.S.C. 1254(a) and (d), known as suspension of deportation." (7) That the circumstances of this case "would also allow the exercise of the remedy known as waiver of excludability, based on 212(c) of the Act, 8 U.S.C. 1182(c)." (8) Finally the petitioner contends that "under O.I. 242(a)(21) the District Director may withhold or cancel deportation proceedings against an alien who is seeking to enroll, or has enrolled, in a course of academic study, under circumstances which would be applicable in this cause; and under O.I. 103.1(a)(i)(ii) the District Director may withhold or cancel deportation proceedings in compassionate cases under the deferred action program."

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefits sought. Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966). In such proceedings, the law of a foreign country is a question of fact which must be proved by the petitioner if he relies on it to establish eligibility for an immigration benefit. Matter of Annang, 14 I&N Dec. 502 (BIA 1973).

The immigration laws that we administer do provide for a United States citizen parent to confer status on an adopted child under section 201(b) of the Act, 8 U.S.C. 1151(b). To establish that a beneficiary is eligible for immediate relative status as an unmarried son or unmarried daughter under section 201(b), the petitioner must show that the beneficiary once qualified as his "child" within the meaning of section 101(b)(1) of the Act. Matter of Coker, 14 I&N Dec. 521 (BIA 1974). The term "child," as defined by that section, includes an adopted child, section 101(b)(1)(E).

In this case, the petitioner has failed to establish that the beneficiary had been lawfully adopted. Article 400 of the Civil Code of Tamaulipas in effect at the time of the alleged adoption authorized only persons "who do not have natural descendants" to adopt minor children. The beneficiary's adoption was not in compliance with controlling law as the petitioner and his spouse had a natural child living in May 1972.

The petitioner alleges that current trends no longer consider Allmon as a viable precedent. However, he has not supported this allegation with evidence that the Civil Code of Tamaulipas has amended its "no descendants" requirement. Consequently, we find that Allmon is still controlling. See also Matter of Garcia-Rodriguez, 16 I&N Dec. 438 (BIA 1978).

Petitioner contends that "it is reasonable to conclude that the Mexican Court, in passing on the adoption in question, considered the requirements of [article] 400 and, having decided that the purpose of the no-descendant requirement was not applicable here, waived that requirement." We find no indication that the Mexican adoption court was made aware of the facts of this case.

Petitioner's reliance on Espinosa is misplaced. We stated in Espinosa that the issue was "whether the state of Texas would recognize the mutual consent divorce [decree before the Civil Registrar of Coahuila, Mexico] as valid." The decree was improperly entered and subject to possible annulment under Mexican law. However, the Civil Code of Coahuila explicitly provided that any such divorce decree would be considered valid until such time as it otherwise might be declared void by court action. In reliance on this express statutory presumption of validity, we found that Texas courts would accept the decree as valid. There is no indication here that the Civil Code of Tamaulipas contains a similar statute recognizing invalid adoptions as presumptively valid. On the contrary, the Civil Code of Tamaulipas, on which we must rely, expressly provides for adoptions only by persons "who have no descendants." Accordingly, the petitioner has not met his burden of establishing the fact of the foreign law. Matter of Annang, supra.

Petitioner's reliance on Mila is also misplaced. The court in Mila held that the Board must recognize customary adoptions in foreign countries, when such countries have no law governing adoptions and when the courts of such countries would enforce customary adoption. Here the Civil Code of Tamaulipas expressly provides for adoptions; Tamaulipas is not a legal system or society which only recognizes adoptions by custom. Under section 101(b) of the Act, the Civil Code of Tamaulipas is determinative of whether a qualifying relationship exists. Matter of Allmon, supra; Matter of Garcia-Rodriguez, supra. Petitioner has not established a qualifying relationship under that law.

As to estoppel, we do not find the Texas doctrine of adoption by estoppel applicable to Mexican adoptions.

Finally, in reference to petitioner's arguments on appeal regarding suspension of deportation, waiver of excludability and withholding or cancellation of deportation proceedings, we note that these matters are not relevant to these visa petition proceedings.

Accordingly, the motion to reopen will therefore be denied.

ORDER: The motion is denied.

MATTER OF HALL

In Deportation Proceedings

A-22103583

Decided by Board February 4, 1982

(1) The respondent, who engages in fund-raising activities as part of his missionary work for the Unification Church, is employed within the contemplation of section 245(c)(2) of the Immigration and Nationality Act, 8 U.S.C. 1255(c)(2), and, therefore, his employment without the permission of the Immigration and Naturalization Service bars him from adjusting his status in the United States to that of a lawful permanent resident.

(2) Where the respondent receives full support in return for his missionary duties, he is not an unpaid volunteer in the service of the Church even though he receives no fixed salary or remuneration in an amount proportional to his success in his work.

(3) In the absence of a clear expression of legislative intent, the Board will not conclude that detriment to the American labor force was Congress' sole or even primary concern in enacting section 245(c)(2) of the Act; however, where the respondent's activities as a fund-raiser could successfully be performed by persons or business enterprises outside the Church and involve the sale of goods, an entrepreneurial undertaking which places the Church in competition with other sellers of such goods, it may not be said that those activities are without adverse impact on the United States labor market.

(4) In considering the applicability of section 245(c)(2) of the Act, the Government does not improperly dictate to the Unification Church the permissible scope of its missionaries' duties by isolating the respondent's fund-raising activities from his purely ministerial duties; determining the status or duties of an individual within a religious organization is a distinct question

from determining whether that individual qualifies for status or benefits under our immigration laws and authority over the latter determination lies not with any ecclesiastical body but with the secular authorities of the United States.

CHARGE:

Order: Act of 1952 - Sec. 241(a)(2) [8 U.S.C. 1251(a)(2)] - Nonimmigrant - remained longer than permitted

ON BEHALF OF RESPONDENT:
David Carliner, Esquire
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1511 K Street, N.W.
Washington, D.C. 20005

ON BEHALF OF SERVICE:
Gerald S. Hurwitz
Appellate Trial Attorney

BY: Milhollan, Chairman; Maniatis, Maguire, Morris, and Vacca, Board Members

At a deportation hearing conducted on December 19, 1978, an immigration judge found the respondent deportable as an overstayed nonimmigrant pursuant to section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), and statutorily ineligible for adjustment of status under section 245 of the Act, 8 U.S.C. 1255, by reason of the unauthorized employment bar of section 245(c)(2), 8 U.S.C. 1255(c)(2), but granted him the privilege of voluntary departure in lieu of deportation. The respondent concedes deportability but contests the denial of section 245 relief.

At the conclusion of the deportation hearing, as the immigration judge was stating his decision, the respondent through counsel made an oral motion to reopen the proceedings to permit further development of the record with respect to his eligibility for adjustment of status. The immigration judge declared the hearing closed and refused to entertain the respondent's motion to reopen. 1/ Subsequent to the hearing, on December 26, 1978, the respondent submitted a formal, written motion to reopen which the immigration judge denied in a decision dated February 14, 1979. The respondent appealed from that decision and oral argument in the case was heard by the Board on May 1, 1980.

In seeking to reopen deportation proceedings, it is incumbent upon the alien to make a prima facie showing of eligibility for the relief sought. Matter of Rodriguez, Interim Decision 2727 (BIA 1979). The respondent has not sustained his burden. Upon careful consideration of the arguments advanced by the respondent since the hearing, we are satisfied that section 245(c)(2) operates to bar adjustment in his case. As no purpose would be served by reopening, the respondent's appeal from the denial of his motion to reopen will be dismissed.

The record reflects that the respondent, a 36-year-old single male, a native and citizen of Guyana, entered the United States at New York in May 1976 upon presentation of a nonimmigrant visitor visa. He came to the United States for the purpose of attending a rally sponsored by the Unification Church at Yankee Stadium. In July 1976, the respondent departed New York for Puerto Rico to "work . . . as a missionary" for the Unification Church (Tr. p. 9), a pursuit in which he is apparently still engaged.

1/ Prior to the deportation hearing, the District Director had denied the respondent's application for adjustment of status on a ground other than that cited by the immigration judge, i.e., section 212(a)(15) of the Act, 8 U.S.C. 1182(a)(15). The respondent contends that the Service did not raise the unauthorized employment bar of section 245(c)(2) as a possible basis for denial when he renewed his application at the hearing and that he was therefore denied an opportunity to show that the bar did not apply in his case. Despite this objection, the immigration judge ruled that the respondent had had adequate opportunity to demonstrate eligibility for the relief sought.

According to the respondent, his duties as a missionary consist of holding and attending seminars, witnessing, visiting houses and teaching people on the street the word of God, distributing literature, helping people financially under Church auspices, and visiting churches. Those duties also include selling toys, jewelry and trinkets as a means of raising funds for the Church. The respondent estimates that he spends from one-third to one-half of his time fund-raising.

The respondent testified that the proceeds of his fund-raising efforts are turned over to the Director of the Church in Puerto Rico with whom he shares a rented house. In return, the respondent receives full support from the Church which includes housing, food, clothing, medical expenses, transportation, entertainment, toiletries, and other personal expenses. In addition, the respondent is given approximately $25 in cash each month for "walking around" money, enough to ensure that he has $10 in pocket money at all times.

The unauthorized employment bar of section 245(c)(2), added by the 1976 Amendments to the Act, 2/ renders ineligible for adjustment of status aliens (other than immediate relatives) who, after the effective date of the bar, continued in or accepted unauthorized employment prior to filing an adjustment application. The respondent continued his activities on behalf of the Unification Church, which he does not contend were authorized by the Service, after the January 1, 1977, effective date of the bar. His adjustment application, based upon his status as the beneficiary of an approved second-preference visa petition submitted by his lawful permanent resident mother, was not filed until May 1977. The dispositive question, then, is whether those activities constitute "employment" within the contemplation of section 245(c)(2). The immigration judge answered that question in the affirmative, concluding that the respondent was employed as a fund-raiser for the Church.

2/ 1976 Amendments to the Immigration and Nationality Act, Pub. L. 94-571, 90 Stat. 2703 (effective January 1, 1977).

The respondent contends that the activities in question may not properly be characterized as employment so as to bar him from the benefits of section 245. He describes his position with the Church as an unpaid volunteer, not an employee, arguing that he labors for no salary. He submits that his service as a missionary is not the type of pursuit Congress contemplated in enacting section 245(c)(2). Finally, the respondent argues that his fund-raising efforts and his teaching, proselytizing, and other religious duties are integral, indivisible parts of his missionary work and that it is not within the province of the Immigration and Naturalization Service or the immigration judge to determine what constitutes missionary work for any particular church.

The respondent's contention that he is an unpaid volunteer in the service of the Church is not persuasive. He clearly receives compensation in return for his efforts on behalf of the Church. By his own account, he is provided the wherewithal to cover both necessary and nonessential expenses, such as entertainment and recreation. He is, in addition, given discretionary funds as needed. The respondent's relationship with the Church in effect guarantees him a standard of living similar to that of many moderate-income wage earners. The fact that he receives no fixed salary or remuneration in an amount proportional to his success as a fund-raiser is, in our view, immaterial.

The respondent insists that his work on behalf of the Unification Church is not the sort of undertaking Congress intended to discourage with the imposition of the unauthorized employment bar inasmuch as his activities have no adverse impact on the United States labor force. As the respondent acknowledges, however, the legislative history of section 245(c)(2) provides little guidance as to the specific end or ends sought to be served by the bar. Congress' sole statement of purpose, contained in the House Judiciary Committee report to the 1976 Amendments, 3/ reads

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3/ H.R. Rep. No. 94-1553, 94th Cong. 2d Sess. (September 15, 1976), reprinted in 1976 U.S. Code Cong. & Ad. News 6073, 6084.

as follows:

> . . . [under the proposed legislation,] aliens who are not defined as immediate relatives and who accept unauthorized employment prior to filing their adjustment application would be ineligible for adjustment of status. *The Committee believes that this provision would deter many nonimmigrants from violating the conditions of their admission by obtaining unauthorized employment.* Similar provisions were included in legislation which passed by the House of Representatives during the 92d and 93rd Congresses. (Emphasis added.)

Concern over the impact of a nonimmigrant's unauthorized employment upon the American labor force may well have been a motivating factor underlying the enactment of section 245(c)(2). However, Congress did not so indicate, either indirectly in the legislative history of the proposal ultimately enacted or directly in the express language of the statute. 4/ Absent a clear expression of legislative intent, we are unwilling to conclude that detriment to American labor was Congress' sole or, for that matter, primary concern.

Manifest in the report language quoted above is Congress' substantial interest -- apart from its arguable interest in protecting the domestic labor market -- in the enforcement of our immigration laws with respect to nonimmigrant aliens within our borders. *Cf.*

4/ Congress could have, but did not, exempt from the bar nonimmigrants engaged in employment determined to be of benefit to the United States. *Cf. Matter of Raol*, 16 I&N Dec. 466 (BIA 1978). Our reluctance to read a limitation into the statute not placed there by Congress is bolstered by the fact that an alien within the ambit of section 245(c)(2) is deprived of no ultimate right under the immigration laws since he remains free to apply to a United States consul abroad for an immigrant visa.

Matter of Yazdani, Interim Decision 2848 (BIA 1981). 5/ Correlatively, by penalizing nonimmigrants who work in violation of the terms of their admission, Congress may well have sought to discourage aliens admitted to the United States for a temporary purpose from acquiring a source of funds to support a prolonged unlawful stay in this country.

In any event, we are not persuaded that the respondent's activities as a fund-raiser are without adverse impact on the United States labor market. Unlike the purely ministerial duties carried on by the respondent, we consider the raising of funds a secular function which could successfully be performed by persons or business enterprises outside the Church. We note, moreover, that the respondent does not merely solicit donations in the name of the Unification Church but engages in the sale of goods, an entrepreneurial undertaking which places the Church in competition with other sellers of such goods.

Under the circumstances here presented, were the institution or organization for which the respondent performs his fund-raising services not a church, we would have no difficulty in finding the section 245(c)(2) bar applicable. We find no basis in the language or history of the statute for carving out an exception to the bar in the case of a church, at least with respect to the secular activities of its adherents.

We reject the respondent's suggestion that the Government, by isolating his fund-raising activities, improperly seeks to dictate to the Unification Church the permissible scope of its missionaries' duties. Determining the status or the duties of an individual within a religious organization is one thing; determining

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5/ Pursuant to those immigration laws, a nonimmigrant is forbidden to work in this country unless he has been accorded a nonimmigrant classification which authorizes employment or has been granted specific work authorization from the Service; a nonimmigrant who is permitted to work may engage only in such employment as has been authorized. 8 C.F.R. 214.1(e); 8 C.F.R. 109.1(a).

whether that individual qualifies for status or benefits under our immigration laws is another. Authority over the latter determination lies not with the Unification Church or any other ecclesiastical body but with the secular authorities of the United States. See Matter of Rhee, 16 I&N Dec. 607 (BIA 1978).

In sum, we conclude that the respondent, through his fundraising activities, engaged in employment without Service permission in contravention of section 245(c)(2) and consequently is not eligible to adjust his status in this country to that of a lawful permanent resident. His motion to reopen the proceedings to permit consideration of his application for adjustment of status under section 245 was, therefore, properly denied. The appeal will be dismissed.

ORDER: The appeal is dismissed.

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MATTER OF RICHARD

In Visa Petition Proceedings

A-22677182

Decided by Board February 9, 1982

(1) Under the Civil Code of Haiti, as amended by the 1959 Presidential Decree, children born out of wedlock after January 27, 1959, and acknowledged by their natural father have the same rights and obligations as legitimate children.

(2) Where the beneficiary, a native and resident of Haiti, was born out of wedlock in 1969 and acknowledged by the natural father in 1977, prior to his eighteenth birthday, he is deemed a legitimate child for immigration purposes under section 101(b)(1)(C) of the Immigration and Naturalization Act, 8 U.S.C. 1101(b)(1)(C). Matter of Remy, 14 I&N Dec. 183 (BIA 1972) overruled.

ON BEHALF OF PETITIONER:
Pro se

ON BEHALF OF SERVICE:
Gerald S. Hurwitz
Appellate Trial Attorney

BY: Milhollan, Chairman; Maniatis, Maguire, Morris, and Vacca, Board Members

The petitioner appeals from a decision of the District Director dated May 11, 1981, denying a visa petition filed on behalf of the beneficiary as the petitioner's unmarried son under section 203(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(a)(2). On December 30, 1981, the Board entered a decision in this case remanding the proceedings to the District Director. That decision will be reconsidered on our own motion. Our December 30, 1981, decision will be vacated and the following decision entered.

J 21. 11/2:

The petitioner is a 37-year-old native of Haiti and lawful permanent resident of the United States. The beneficiary is a 12-year-old male native and citizen of Haiti who was apparently born out of wedlock to the petitioner and a woman he never married. Documents offered by the petitioner reflect that the beneficiary was formally acknowledged by the petitioner as his child before an official of the Civil Registry of the municipality of Duvalierville, Haiti, on December 30, 1977. The District Director denied the petition on the ground that the beneficiary was born out of wedlock and had never been legitimated. The petitioner appealed from this decision.

In order to qualify as a "son" for immigration purposes, the beneficiary must once have qualified as the "child" of the petitioner under section 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1). Matter of Coker, 14 I&N Dec. 521 (BIA 1974). The pertinent parts of section 101(b)(1) provide:

> The term "child" means an unmarried person under twenty-one years of age who is--
>
> (A) a legitimate child; or
>
> (B) . . .
>
> (C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.

In the present case the beneficiary was born out of wedlock. Accordingly, it must be established that he is either deemed legitimate or legitimated under the law of Haiti or Illinois.

Under the law of Illinois, the petitioner's place of residence, the natural parents must marry in order to legitimate the child. Thus, the beneficiary has not been legitimated under the law of that state.

In Matter of Remy, 14 I&N Dec. 183 (BIA 1972), we held that under the law of Haiti, the legitimation of a child born out of wedlock requires the subsequent marriage of the child's natural parents, as well as acknowledgment of the child prior or during the act of marriage. 1/ We predicated such holding on Article 302 of the Civil Code of Haiti, as amended by Decree Law 466 of December 22, 1944. Subsequently, in Matter of Levy, Interim Decision 2830 (BIA 1980), the Board noted a Presidential Decree adopted in Haiti on January 27, 1959 which provides in pertinent part:

> Article 1. Natural filiation shall give rise to the same obligations as those deriving from legitimate filiation. Nonetheless, the proof

---

1/ Article 302 of the Civil Code of Haiti, as amended by Decree Law 466 of December 22, 1944 (Le Moniteur, December 25, 1944), provides:

> Children born out of marriage, with the exception of incestuous or adulterine children, are legitimated by the subsequent marriage of their father and mother, provided they are acknowledged before the marriage or during the act of marriage. . .
>
> Legitimation shall be recorded at the margin of the birth registration of the legitimated child . . .

A previous translation of Article 302 provided to the Board reflected that children of adulterous or incestuous relationships could be legitimated under the provisions of that Article. The present translation provided by the Library of (cont'd)

> proof of natural filiation may result only from voluntary recognition or from judicial recognition in the case where the latter is authorized by law.
>
> Article III. The present decree which repeals all laws or applications of laws, all law-decrees that are contrary to it; namely articles 308, 583, 606; second paragraph, 624 and 742 of the Civil Code, will be published and executed at the suite of the State Secretary of Justice.

The record was remanded in Matter of Levy for more evidence regarding the effect of the January 27, 1959, Presidential Decree.

In the present case, the Service Appellate Trial Attorney requested a legal opinion from the Hispanic Law Division of the Library of Congress regarding the legitimacy of the beneficiary under the law of Haiti in effect at the time of his birth. In the resulting Library of Congress memorandum, it was opined that the January 27, 1959, Presidential Decree granted children born out of wedlock after that date "the same rights and obligations as those created by legitimate filiation." See Appendix. The Service forwarded the memorandum requesting that "it be included in the record file and considered by the Board." By memorandum dated December 18, 1981, the Appellate Trial Attorney advised the Board that "the Service concurs with the opinion of the Library of Congress in this case . . . ."

We have held that when the country where a beneficiary was born and resides eliminates all legal distinctions between legitimate and illegitimate children, all subsequently born children are

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reflects that such is not the case. Those Board decisions referencing the mistranslation are accordingly modified to the extent of such mistranslation. See, for example, Matter of Remy, 14 I&N Dec. 183, 184 (BIA 1972).

deemed to be the legitimate off-spring of their natural father for immigration purposes. Matter of Pavlovic, Interim Decision 2799 (BIA 1980); Matter of Hernandez, Interim Decision 2712 (BIA 1979); Matter of Sanchez, 16 I&N Dec. 671 (BIA 1979); Matter of Wong, 16 I&N Dec. 646 (BIA 1978). The 1959 Haitian Presidential Decree would appear to abolish all legal distinctions between children born in and out of wedlock. Article III of the Decree by its terms repeals all laws to the "contrary." The Library of Congress in an opinion accepted by the Service concludes that the effect of the 1959 Decree is to render legitimate children born in Haiti after January 27, 1959. Under these circumstances, we find that under the law of Haiti at the time of this beneficiary's birth, a child born out of wedlock was deemed the legitimate off-spring of his natural father.

The record will be remanded to the District Director for further consideration based on the above findings. The District Director should of course be satisfied with the authenticity of any foreign document of record upon which he relies to establish the claimed familial relationship.

ORDER: The December 30, 1981, decision of the Board in this case is reconsidered and withdrawn and the above decision entered.

FURTHER ORDER: The record is remanded to the District Director for further proceedings in accordance with the foregoing opinion and the entry of a new decision.

APPENDIX
ACKNOWLEDGMENT AND LEGITIMATION

Haiti

In order to determine certain rights under the Immigration and Nationality Act of 1952, the requester wants to ascertain whether a 1977 act of acknowledgment of a child born in 1969 in Haiti, attested to by the father in that country, is equivalent to the legitimation of that child.

I. Classification of Children

Under the provisions of the Civil Code of Haiti, children are classified into three groups: legitimate, natural, and illegitimate. 2/ Children of married parents belong to the first group, those born of unmarried parents to the second group, and those whose conception and birth occur under adulterous or incestuous circumstances, to the third.

II. Acknowledgment of Children

Acknowledgment of children and the concomitant legal effects are also regulated in the Civil Code as amended by Decree Law 466 of December 22, 1944, 3/ and subsequently by the Decree of January 27, 1959. 4/ Pertinent provisions of the Code state:

> Art. 305. (as amended in 1944) Acknowledgment of a natural child shall be made through a special instrument excuted before an Official of the Civil Registry if it is not made in the birth registration act.
>
> Art. 306. Acknowledgment cannot benefit a child born from an incestuous or adulterous union.
>
> Art. 307. The acknowledgment made by the father without the assent and consent of the mother shall not affect the acknowledgment made by the father.

2/ A. Léger, Civil Code Annotated, arts. 293 and 302 (Port-au-Prince, Imprimerie de "La Presse", 1931).

3/ Le Moniteur, December 25, 1944.

4/ Id., January 29, 1959.

> Art. 308. (repealed by the Decree of January 27, 1959) Voluntary acknowledgment made during the marriage by one of the spouses for the benefit of the other spouse's natural child born before his or her marriage, with the exception of the acknowledgment of [their] child, shall not prejudice the former [i.e., their child born out of marriage] or children born out of this marriage. Nevertheless, the acknowledgment shall produce legal effects after the dissolution of this marriage if no children are born of it.

In addition, the previously cited Decree of January 27, 1959, further amended the Civil Code by granting acknowledged natural children the same rights and obligations legitimate children have. This Decree provides:

> Art. 1. Natural filiation creates the same rights and obligations as those created by legitimate filiation.
>
> Nevertheless, proof of natural filiation cannot be other than that arising out of a voluntary act of acknowledgment or out of a judicial acknowledgment in those cases authorized by the law.

In conclusion, under the laws of Haiti, the child born in 1969 and acknowledged by his natural father in 1977 benefits from the provisions of the Decree of January 27, 1959, which grants him the same rights and obligations as those created by legitimate filiation.

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MATTER OF FAKALATA

In Visa Petition Proceedings

A-22464956

Decided by Board March 10, 1982

(1) In order to prove that a customary adoption is valid for immigration purposes, the petitioner must establish that the adoption creates a legal status or relationship which is recognized by the government of the place where it occurred as carrying with it substantial legal rights and obligations.

(2) Notwithstanding that the Crown Solicitor of Tonga is of the opinion that customary adoptions in that country create a new parent and child relationship, the facts indicate that this relationship is not exclusive of the natural parents, does not give the adopted child rights and duties comparable to a natural legitimate child, and does not have any legal effect under Tongan law.

(3) Where the petitioner has failed to prove that customary adoptions in Tonga create a parent and child relationship which establishes legal rights and obligations that are sanctioned by Tongan law, such adoptions are not recognized as valid under United States immigration laws. Matter of Palelei, 16 I&N Dec. 716 (BIA 1979) reaffirmed.

(4) Although a Tongan customary adoption was recognized as valid for immigration purposes in Mila v. District Director of Denver, Colorado, 494 F.Supp. 998 (D. Utah 1980), that decision is not binding in cases, as the instant one, arising outside of the jurisdiction of the District of Utah.

J 21.11/2:

Interim Decision #2899

ON BEHALF OF PETITIONER:

Terry J. Helbush, Esquire
Simmons and Ungar
417 Washington Street
San Francisco, California 94111

BY: Milhollan, Chairman; Maniatis, Maguire, Morris, and Vacca, Board Members

The lawful permanent resident petitioner applied for preference status on behalf of the beneficiary as his adopted son under section 203(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(a)(2). In a decision dated October 1, 1979, the District Director denied the petition. The petitioner has appealed from that decision. The appeal will be dismissed.

The petitioner is a 72-year-old native and citizen of Tonga. The beneficiary is also a native and citizen of Tonga who was born the legitimate son of the petitioner's cousin on June 30, 1951. At the age of 9 months, the beneficiary was taken into the petitioner's home and was raised as a member of his family. The petitioner argues that under these circumstances the beneficiary qualifies as his adopted son under the customary law of Tonga.

The District Director denied the petition on the ground that the "adoption" did not create a legal status or relationship under Tongan law and therefore was not legally valid. In reaching this conclusion, he relied on our decision in Matter of Palelei, 16 I&N Dec. 716 (BIA 1979), where we found that a customary adoption in Tonga would not be considered valid for immigration purposes. In that decision we noted the opinion of the Crown Solicitor of Tonga which stated that a customary adoption was not recognized as legally valid under the law of that country.

On appeal, the petitioner has submitted another opinion from the Crown Solicitor of Tonga dated July 18, 1980, which states, in pertinent part:

> In Tonga, there is no reported "law" concerning parental rights and duties and children's rights and duties when customarily adopted. Tongan

> customary adoptions are an important aspect of our traditional culture and continue to be practiced today very commonly. There is no need for anyone to go to the courts to enforce parental rights or duties or children's rights or duties because everyone understands that customarily adopted children are treated in all respects as if they were legally adopted except that they cannot inherit. Even illegitimate children adopted according to our statutory law cannot inherit, but they also are considered legally adopted.
>
> Customary adoptions used to [sic] prior to our Constitution allow the adopted children to succeed to estates and titles, but the Constitution forbade the inheritance or succession by adopted children. But, the Constitution did not outlaw customary adoptions. They have continued until this day. Many families in Tonga have one or more members who are adopted. The adopted children cannot succeed to the estates of their parents, but in all other ways, they are considered the real children of their adopting parents. Such adoptions have the effect in Tonga of creating a parent and child relationship.

According to the petitioner, the Crown Solicitor's statement that customary adoptions create a parent and child relationship indicates that such adoptions are legally recognized in Tonga. Citing our decisions in Matter of Ng, 14 I&N Dec. 135 (BIA 1972), and Matter of Yue, 12 I&N Dec. 747 (BIA 1968), he notes that the Board has previously recognized customary adoptions as valid for immigration purposes. He therefore contends that we should overrule our decision in Matter of Palelei, supra, and find his customary adoption of the beneficiary valid for immigration purposes. After careful consideration, we decline to so act.

The Board has indeed accorded preference status based upon a claimed customary adoption under Chinese law. *See Matter of Rodriguez*, 14 I&N Dec. 335 (BIA 1973); *Matter of Poon*, 14 I&N Dec. 155 (BIA 1972); *Matter of Ng*, *supra*; *Matter of Yue*, *supra*.

However, the customary law applied in those cases consisted of an established system of law which was based on the Ching Code. The law set forth specific rules relating to adoption and was recognized in the Chinese courts as determinative of the validity of customary adoptions and the legal rights and duties of the parents and children involved in them. *See Matter of Poon*, *supra*; *Matter of Ng*, *supra*; *Matter of Chin*, 12 I&N Dec. 240 (BIA 1967). Thus, where we have found that the claimed adoptions did not comply with the provisions of that customary law, we have considered them invalid for immigration purposes. *See* *Matter of Lee*, 15 I&N Dec. 221 (BIA 1975).

On the other hand, in countries where adoption is practiced according to local custom, but does not create substantial legal rights and obligations which are sanctioned by the government as having legal force, the Board has declined to give such customary adoptions recognition. *See Matter of Benjamin*, 15 I&N Dec. 709 (BIA 1976); *Matter of Rehman*, 15 I&N Dec. 512 (BIA 1975); *Matter of Mozeb*, 15 I&N Dec. 430 (BIA 1975); *Matter of Bhegani*, 15 I&N Dec. 299 (BIA 1975); *Matter of Kong*, 14 I&N Dec. 649 (BIA 1974), motion to reconsider denied, *Matter of Kong*, 15 I&N Dec. 224 (BIA 1975); *Matter of Ashree, Ahmed and Ahmed*, 14 I&N Dec. 305 (BIA 1973); *Matter of Boghdadi*, 12 I&N Dec. 666 (BIA 1968); *Matter of B-*, 9 I&N Dec. 521 (BIA 1961).

We must therefore determine whether customary adoption in Tonga creates a legal status which is recognized by the government in that country as carrying with it substantial legal rights and obligations. The evidence which best indicates the Tongan government's position regarding customary adoption consists of the two opinions offered by the Crown Solicitor. In the first of those opinions, which we cited in *Matter of Palelei*, *supra*, the Crown Solicitor unequivocally pronounced that "there is no provision in our law for the adoption of children born legitimately" and that a customary adoption "is not recognized as legally valid under Tongan law."

He further notes in his second opinion that there is no reported law concerning the rights and duties of parents or children involved in customary adoptions. This lack of judicial law is attributed to the fact that "everyone understands that customarily adopted children are treated in all respects as if they were legally adopted except that they cannot inherit." In conclusion, the Crown Solicitor states that customary adoptions have the effect in Tonga of creating a parent and child relationship.

Other evidence relating to the legal effect of customary adoptions in Tonga includes a statement from Mr. William Clive Edwards, who states that he is a licensed lawyer of the Supreme Court of Tonga, and a monograph entitled "Tongan Adoption." Morton, Tongan Adoption, in Transactions in Kinship--Adoption and Fosterage in Oceania 64 (I. Brady ed. 1976). Mr. Edwards asserts that the law "in Tonga only enables illegitimate children to be adopted and it does not allow for adoption of legitimate issues." Mr. Morton offers the following statement in regard to adoption transactions in Tonga:

> The Tongan government sanctions only a few of these adoptions. Few applications for legal adoption are made to the courts because the circumstances of Tongan adoption are often incongruent with the European model of adoption applied in the courts.

Morton, supra, at 65.

According to these sources, the statutory law of Tonga only provides for the adoption of illegitimate children and does not officially recognize the adoption of legitimate children as establishing any rights or duties of the parties involved. 1/ From this

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1/ According to Mr. Edwards and the opinions of the Crown Solicitor of Tonga, Cap. 19 of the Laws of Tonga sets forth a procedure for the adoption of illegitimate children. That type of adoption in Tonga is not now before us, so we need not determine its validity for immigration purposes at this time.

we must conclude that customary adoptions, which are apparently accomplished without the benefit of any ceremony or formal proceedings, do not create a legal status or relationship under Tongan law.

The petitioner argues that the Crown Solicitor has indicated that customary adoptions are legally recognized in Tonga by his statement that these adoptions create a parent and child relationship. However, our examination of Mr. Morton's treatise on adoptions in Tonga persuades us that the parent and child relationship resulting from a customary adoption does not carry with it such rights and obligations as we would characterize as legally sanctioned. For example, he states that "[i]n contrast to Western practices of child rearing, the rights and duties of jural parenthood extend to a large number of kinsmen, neighbors, and friends." Morton, *supra*, at 65. He further explains that children are considered to be valuable resources which are essentially shared among kinsmen and that adoption transactions are a means of strengthening the bonds of kinship. (pp. 73, 76, 77).

According to Mr. Morton, the adoption of a child does not significantly alter his kinship status as acquired at birth through his natural parents, but rather provides him with two overlapping kindreds because most adoptions take place between blood relatives (p. 77). Since an adopted child's relationship to his natural parents is generally a continuing one, he benefits from the adoption in that it gives him the advantage of manipulating his kinship status by stressing his relationship to either his natural parents or his adoptive parents (pp. 77-78, 80).

Although a new parent and child relationship may be created through customary adoption in Tonga, it appears that it is not exclusive since the relationship of an adopted child to his natural parents is diminished only by his own choice. A system which gives an adopted child the option to maintain a legal relationship with his natural parents is inconsistent with our concept of adoption and with section 101(b)(1)(E) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(E). Consequently, we are not convinced that the parent and child relationship resulting from Tongan customary adoption creates rights and duties which we would recognize as enforceable by law.

Also of significance to our inquiry is the fact that the Constitution of Tonga prohibits the inheritance of land by children who are adopted according to customary practice. Although the petitioner notes that the Board has found Chinese customary adoptions which bestowed no succession rights to be valid for immigration purposes in Matter of Ng, supra, and Matter of Yue, supra, we believe that the situation presented here is distinguishable. Under Chinese customary law, two kinds of adoption exist: (1) adoption of a male child for the purpose of instituting him as an heir for perpetuation of the ancestral cult, which requires that the child come from the same kindred and have the same surname, and (2) adoption of a child, whether male or female, without intending to institute it as an heir. See Matter of Young, 14 I&N Dec. 158 (BIA 1972); Matter of Poon, supra; Matter of Ng, supra; Matter of Chin, supra. Thus, although male children who are without the required qualifications and all females may not inherit from their adoptive parents under Chinese customary law, they are nonetheless recognized as having equal status with those natural children who also do not have the right to inherit. See Matter of Ng, supra.

On the other hand, children adopted in Tonga pursuant to custom are not permitted to inherit and therefore do not have rights comparable to those of natural legitimate children. The Board has refused to recognize as valid for immigration purposes customary adoptions which do not accord adopted children a status similar to that of natural children. See Matter of Mozeb, supra, Matter of Kong, supra.

Customary adoptions in Tonga do not give the adopted child a legal status or relationship which bestows rights and obligations comparable to those of natural legitimate children and they do not appear to have any legal effect under Tongan law. The Crown Solicitor's original conclusion that customary adoptions are not recognized as legally valid has not been retracted or contradicted, nor has the petitioner offered any evidence which has persuaded us that they have any legal effect. We therefore conclude that these adoptions should not be recognized as valid for immigration purposes.

We note in this regard the suggestion by Mr. Morton that an adoption may be obtained through application to the courts which is recognized by Tongan law as according rights of succession to the adopted child. Morton, *supra* at 65, 71. The petitioner has offered no evidence that would either verify or refute the existence of such a procedure. However, if a means of acquiring legal sanction for an adoption is available, we believe that our immigration laws would require a person seeking immigration benefits on the basis of an adoption in Tonga to obtain the endorsement of law in that manner.

We are aware of the decision in *Mila v. District Director of Denver, Colorado*, 494 F.Supp. 998 (D. Utah 1980), which concludes that Tongan customary adoptions should be recognized as valid for immigration purposes. With all due respect to the court, we do not accept its opinion as definitive on this issue. The fact that a lower federal court has rejected a legal conclusion of this Board does not require us to recede from that conclusion in other jurisdictions. *See Matter of Amado and Monteiro*, 13 I&N Dec. 179 (BIA 1969); *Matter of Lim*, 13 I&N Dec. 169 (BIA 1969).

We disagree with the court's conclusion that there is no reason to make a distinction between a system of adoption where a parent-child relationship is sanctioned by law and one where it is only recognized by custom. We believe that the recognition of an adoption by the law of the country where it took place offers some assurance that the adoption is valid. Thus, in our opinion, evidence that an adoption is legally sanctioned provides a necessary safeguard against the possibility of fraud which Congress carefully sought to avoid. 2/ It does not therefore appear unreasonable to

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2/ The concern of Congress that a law granting immigration benefits on the basis of adoption might lead to abuse is reflected in the fact that no such provision was enacted until 1957. *See* S.Rep. 1515, 81st Cong., 2nd Sess. 468 (1950); Act of Sept. Sept. 11, 1957, Sec. 2, 71 Stat. 639. When it was passed, Congress set forth specific requirements for residence and legal custody and included a proviso limiting those entitled to benefit so as to prevent circumvention of the law by fraudulent adoptions. *See* section 101(b)(1)(E) of the Act.

require that the legal system under which an adoption took place must recognize that it creates rights and duties which are enforceable by law.

It is the petitioner's burden in visa petition proceedings to establish the claimed relationship. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). He further bears the burden of proving any foreign law on which he relies. *See Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). We are not persuaded that the petitioner has met his burden in this case. Accordingly, for the reasons stated above, we shall dismiss the appeal. Our decision in *Matter of Palelei*, *supra*, is reaffirmed.

ORDER: The appeal is dismissed.

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MATTER OF LIN

In Exclusion Proceedings

A-24396728

Decided by Board May 6, 1982

(1) An alien who absconds from an Immigration and Naturalization Service detention facility while awaiting exclusion proceedings does not make an entry into the United States as defined in section 101(a)(13) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(13), and, therefore, was properly placed in exclusion proceedings. Matter of A-, 9 I&N Dec. 356 (BIA 1961); and Matter of A-T-, 3 I&N Dec. 178 (BIA 1948), distinguished.

(2) An alien who escapes from Service detention does not acquire the same status as an alien who evades Service inspection by entering the United States surreptitiously and, hence, may not be accorded the procedural benefits of deportation proceedings.

EXCLUDABLE:

Order: Act of 1952 - Sec. 212(a)(19) [8 U.S.C. 1182(a)(19)] - Sought entry by fraud or material misrepresentation

Sec. 212(a)(20) [8 U.S.C. 1182(a)(20)] - Not in possession of a valid unexpired visa or other valid entry document

ON BEHALF OF APPLICANT:
Stephen Singer, Esquire
Barst & Mukamal
127 John Street
New York, New York 10038

ON BEHALF OF SERVICE:
Steven R. Abrams
General Attorney

Gerald S. Hurwitz
Appellate Trial Attorney

J 21. 11/2:

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

This case was last before us on October 6, 1981, when we dismissed a Service appeal from the immigration judge's termination of the exclusion proceedings against the applicant. We agreed with his conclusion that the applicant had entered the United States without inspection and was therefore, subject to deportation proceedings instead of exclusion proceedings. The Service has submitted a motion to reconsider our October 6, 1981, decision on this case. The Service motion to reconsider will be granted and the appeal will be sustained.

The applicant is a native and citizen of China who applied for admission to the United States as a nonimmigrant visitor for pleasure on August 22, 1980. At the inspection, he was in possession of a passport which he had purchased in Hong Kong and which bore the name of another person. He was detained by the Service and placed in exclusion proceedings because of alleged excludability under sections 212(a)(19) and 212(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(19) and 1182(a)(20), for attempting entry by fraud or material misrepresentation and lacking a valid immigrant visa. However, prior to the exclusion hearing he absconded from the Service detention facility in St. Paul, Minnesota, until apprehended two days later on September 6, 1980, in New York City. Consequently, the immigration judge terminated the exclusion proceedings, concluding that the applicant had made an "entry" into the United States.

Our October 6, 1981, decision applied a four element test prescribed in Matter of Pierre, 14 I&N Dec. 467 (BIA 1973), for determining when an alien has made an "entry" into the United States and is therefore subject to deportation and not exclusion proceedings. We then stated that the term "entry," is defined in section 101(a)(13) of the Act, 8 U.S.C. 1101(a)(13), as ". . . any coming of an alien into the United States, from a foreign port or place or from an outlying possession. . . ." A survey of the many cases which have treated this subject over the years leads to the following conclusions: An "entry involves (1) a crossing into the territorial limits of the United States, i.e. physical presence; plus (2) inspection and admission by an immigration officer, United States v. Vasilatos, 209 F.2d 195 (3 Cir. 1954); Lazarescu v. United States, 199 F.2d 898, 900 (4 Cir. 1952); or (3) actual and intentional evasion of inspection at the nearest inspection point, U.S. ex rel. Giacone v. Corsi, 64 F.2d 18 (2 Cir. 1933); Morini v. United States, 221 F.2d 1004 (9 Cir. 1927), cert. denied, 276 U.S. 623 (1928); Lew Moy v. United States, 237 Fed. 50, 52 (8 Cir. 1916); Matter of Estrada-Betancourt, 12 I&N Dec. 191, 193-4 (BIA 1967); coupled with (4) freedom from restraint, United States v. Vasilatos, supra; Lazarescu v. United States, supra.

The applicant physically crossed the United States border at St. Paul where he was detained. He later reached New York City by absconding for two days from a Service detention facility. In Matter of A-, 9 I&N Dec. 356 (BIA 1961), and Matter of A-T-, 3 I&N Dec. 178 (BIA 1948), we had concluded that escaping from Service detention while awaiting exclusion proceedings constituted an entry which required deportation proceedings instead. We reached the same conclusion in this case applying the Pierre test. We concluded that when the applicant absconded, he temporarily achieved freedom from Service restraint, and had made an entry into this country since he was already physically present here. We distinguished two cases cited by the Service in support of its position because there the aliens in question had been paroled into the United States. See Vitale v. INS, 463 F.2d 579 (7 Cir. 1972); Klapholz v. Esperdy, 201 F.Supp. 294 (S.D.N.Y. 1961), aff'd, 302 F.2d 928 (2 Cir. 1962).

However, in its motion to reconsider, the Service has submitted additional arguments which we find convincing. The Service initially contends that the test prescribed in Matter of Pierre, supra, is not met here because the applicant did not evade inspection but rather, was inspected and detained pending exclusion proceedings pursuant to section 235 and 236 of the Act, 8 U.S.C. 1225 and 1226. He was served with a Notice to Alien Detained for Hearing by an Immigration Judge (Form I-122) as prescribed by 8 C.F.R. 235.6(a).

The Service also directs our attention to the case of Luk v. Rosenberg, 409 F.2d 555 (9 Cir. 1969), where an alien had been found excludable, paroled into this country and had absconded for three years. After he was located, his parole was revoked. The court concluded that the alien did not make an "entry" when his parole was revoked, despite his managing to remain for several years after the parole revocation. Congress did not intend to improve such an alien's status, from that of an applicant seeking admission, to that of an alien who has entered the United States and is subject only to deportation proceedings in order to be removed from this country. Luk v. Rosenberg, supra at 558. 1/

The Service also points out distinguishing factors in the two cases we previously cited in support of our October 6, 1981, decision, Matter of A-, supra; and Matter of A-T-, supra. In Matter of A-T-, the applicant had been notified of an exclusion hearing when he first applied for entry. He returned later that day, applied again for entry and was admitted. Consequently, there had been two separate applications for entry and his successful second attempt clearly constituted an "entry" since he had been admitted into this country. In Matter of A-, the alien had been detained on board a ship as a stowaway pursuant to section 273(d) of the Act, 8 U.S.C. When he escaped and managed to land, his status was similar to that of any alien who surreptitiously crosses our border and enters the United States without inspection.

It is well settled that when an alien is paroled into the United States pursuant to section 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5), and 8 C.F.R. 212.5, pending exclusion proceedings in accordance with sections 235 and 236 of the Act and 8 C.F.R. 235 and 236, he does not gain the additional protections prescribed for

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1/ An alien in deportation proceedings has avenues of relief from expulsion unavailable in exclusion proceedings, e.g. suspension of deportation and voluntary departure pursuant to section 244 of the Act, 8 U.S.C. 1254. He also can request a bond redetermination hearing with a right to appeal to this Board pursuant to 8 C.F.R. 242.2(b).

deportation proceedings. Leng May Ma v. Barber, 357 U.S. 185 (1958); Rogers v. Quan, 357 U.S. 193 (1958); United States ex rel. Sellas v. Esperdy, 366 F.2d 266 (2 Cir. 1966); United States ex rel. Lam Hai Cheung, 345 F.2d 989 (2 Cir. 1965); Wong Hing Fun v. Esperdy, 335 656 (2 Cir. 1964); Wong Hing Goon v. Brownell, 264 F.2d 52 (9 Cir. 1959); Licea-Gomez v. Pilliod, 193 F.Supp. 577, 579-580 (N.D. Ill. 1960); United States ex rel. Tom We Shung v. Murff, 176 F.Supp. 253, 256 (S.D.N.Y. 1959); In re Milanovic's Petition, 162 F.Supp. 890, 894 (S.D.N.Y. 1957), aff'd 253 F.2d 941 (2 Cir. 1958); and Luk v. Rosenberg, supra.

We reach the same result when, instead of being paroled, the alien is placed in detention within the United States territory, pursuant to 8 C.F.R. 233.1 and 235.3 and manages to abscond from detention while awaiting his exclusion hearing. The service of the Form I-122 after inspection, vests upon the immigration judge the authority to conduct the exclusion proceedings in order to determine the applicant's admissibility. Whether the applicant is then paroled into the United States or instead kept in detention at a Service facility is not determinative. His escaping from Service detention does not place him in the same status as an alien who manages to evade inspection by entering the United States surreptitiously. He has been inspected but not admitted. We therefore, do not choose to extend our decision in Matter of A- to aliens physically in this country, who are detained pending exclusion proceedings, and who manage to escape from detention. The motion to reconsider will be granted, the Service appeal will be sustained and the record remanded to the immigration judge for resumption of the exclusion proceedings. It is so ordered.

ORDER: The motion to reconsider is granted and the appeal is sustained.

FURTHER ORDER: The record is remanded to the immigration judge for further proceedings consistent with the foregoing opinion and the entry of a new decision.

MATTER OF DRIGO

In Visa Petition Proceedings

A-22631584

Decided by Board May 6, 1982

(1) A visa petition filed on behalf of a beneficiary whose adoption occurred after his fourteenth birthday, but before his sixteenth birthday, was properly denied by the District Director of the Immigration and Naturalization Service because the beneficiary was not eligible for preference status as an adopted child under section 101(b)(1)(E) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(E), at the time the application was filed.

(2) Notwithstanding a recent amendment to section 101(b)(1)(E) which changes the age limitation of an adopted child from fourteen to sixteen years and the fact that the adoption was timely executed under the amended language of the statute, the beneficiary does not qualify for immigration benefits under section 203(a)(2) of the Act, 8 U.S.C. 1153(a)(2), because a visa petition approval would result in giving a priority date to which the beneficiary was not entitled at the time of the filing of the visa petition.

ON BEHALF OF PETITIONER:

Brian L. Masony, Esquire
55-56 Company Street
Christiansted, St. Croix
Virgin Islands 00820

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

The lawful permanent resident petitioner applied for preference status for the beneficiary as her adopted, unmarried son under section 203(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(a)(2). In a decision dated June 1, 1981, the District Director denied the petition on the ground that preference status could not be conferred on the basis of the relationship between the petitioner and beneficiary because the adoption occurred after the beneficiary had reached the age of 14 years. The petitioner has appealed. The appeal will be dismissed.

The beneficiary is a 16-year-old native and citizen of Dominica, West Indies. The petitioner is a 41-year-old native and citizen of Dominica, West Indies who was admitted to the United States as a lawful permanent resident in 1978. The petitioner filed a visa petition on behalf of the beneficiary on May 19, 1981.

In support of the petition, the petitioner submitted a birth certificate which shows that the beneficiary was born on June 25, 1965, and an adoption decree which was rendered on October 2, 1979, in the Virgin Islands.

On appeal, the petitioner contends through counsel's brief dated June 15, 1981, that "a decree of adoption is fully effective as of the date entered nunc pro tunc and is entitled to recognition for immigration purposes." Petitioner adds that the "Territorial Court of the Virgin Islands entered a decree of adoption nunc pro tunc as of May 7, 1979," when the beneficiary was only 13 years old. We rejected this argument in Matter of Cariaga, 15 I&N Dec. 716 (BIA 1976). We note at the time of the District Director's decision, the act of adoption must have occurred before the child attained the age of 14. It was Congress' intent that the age restriction in section 101(b)(1)(E) be construed strictly. Petitioner further contends that it is an abuse of discretion to deny the visa petition under the facts of this case. There is nothing in the record which lends any substance to this claim and it will not be further considered. See Matter of Cariaga, supra.

Section 203(a)(2) provides for the granting of preference status to an unmarried son or unmarried daughter of an alien lawfully admitted for permanent residence. The petitioner must show that the beneficiary once qualified as her "child" within the meaning of section 101(b)(1) of the Act. When the District Director's decision was rendered, the term "child" was defined in section 101(b)(1)(E) as:

> . . .
>
> a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years. . . .

In this case, the adoption occurred after the beneficiary's 14th birthday but before his 16th birthday. Consequently, when the petition was filed the beneficiary was not eligible for preference status as an adopted child under section 101(b)(1)(E) of the Act. Accordingly, we find that the District Director's decision was correct. However, subsequent to the District Director's decision the definition of an adopted child within the statute was amended, raising the age limitation from 14 to 16 years. Section 101(b)(1)(E) of the Act, 8 U.S.C. 1101(b)(1)(E), as amended by section 2 of the Immigration and Nationality Act Amendments of 1981, Pub. L. 97-116, 95 Stat. 1611 (December 29, 1981). Since the beneficiary's adoption occurred before his 16th birthday, he would appear to be eligible for preference status as an adopted child under current law.

Although the beneficiary's adoption was timely as far as the current version of section 101(b)(1)(E) is concerned, we cannot give the petitioner the benefit of that change in the law. The Board has held that in order to be eligible for relative preference status under section 203(a)(2) of the Act, the alien beneficiary must be fully qualified at the time the visa petition is filed, otherwise this would result in our giving a priority date to which the beneficiary was not entitled at the time of filing. Matter of Bardouille, Interim Decision 2880 (BIA 1981). See 22 C.F.R. 42.62(a); 8 C.F.R. 245.1(g)(2).

We note that the petitioner may now wish to file a new visa petition. The petitioner has the burden to establish eligibility for the benefits sought. Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966). Furthermore, the petitioner must establish that the beneficiary has been in her legal custody for a period of two years subsequent to the adoption, see Matter of Lee, 11 I&N Dec. 911 (BIA 1966), and that he has resided with his adoptive parent for the same length of time, either before or after the formal adoption. See Matter of M-, 8 I&N Dec. 118 (BIA 1958; A.G. 1959). From this record, it appears that the beneficiary has resided with the petitioner and has been in her legal custody for more than two years since the adoption.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

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MATTER OF MARTIN

In Deportation Proceedings

A-21398402

Decided by Board June 9, 1982

(1) Robbery is a crime involving moral turpitude.

(2) Where the alien respondent was convicted of aggravated robbery and received a sentence to confinement totaling 12 years, but thereafter that sentence was voided and the respondent resentenced to 3 months confinement and 5 years probation pursuant to the provisions of Colorado Rule of Criminal Procedure 35(a), her sentence does not constitute a "sentence to confinement for a year or more" under section 241(a)(4) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(4); therefore, she is not deportable under that section of the Act.

CHARGE:

Order: Act of 1952 - Sec. 241(a)(4) [8 U.S.C. 1251(a)(4)] - Conviction of a crime involving moral turpitude within 5 years after entry and sentenced to confinement for a year or more

ON BEHALF OF RESPONDENT:
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Colorado Springs, Colorado 80903

ON BEHALF OF SERVICE:
Arnie R. Brassart
General Attorney

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

J 21. 11/2:

This matter is before the Board on appeal from the immigration judge's decision of October 16, 1981, finding the respondent deportable under section 241(a)(4) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(4), as an alien who has been convicted of a crime involving moral turpitude committed within 5 years of entry and sentenced to confinement for a year or more. The appeal will be sustained.

The respondent is a 26-year-old native and citizen of Great Britain who entered the United States on October 4, 1976, as the nonimmigrant fiancee of a United States citizen. Her status was adjusted to that of a permanent resident on August 9, 1977, based upon classification as the spouse of a United States citizen. On November 21, 1980, the respondent was convicted in Colorado County District Court on three counts of aggravated robbery and one count of conspiracy to commit aggravated robbery. She was sentenced to 8 years in the Colorado State Prison for each of the three robbery counts, to run concurrently, and to 4 years for the conspiracy count, to run consecutively. However, she thereafter moved for reconsideration of her sentence, and on February 25, 1981, the same court (with a different judge presiding) resentenced the respondent to 3 months time served and placed her on probation for 5 years.

It is clear, and the respondent does not contend otherwise, that robbery is universally recognized as a crime involving moral turpitude. See U.S. ex rel. Cerami v. Uhl, 78 F.2d 698 (2d Cir. 1935); Matter of G--R--, 2 I&N Dec. 733 (BIA 1946; A.G. 1947); Matter of Kim, 17 I&N Dec. 144 (BIA 1979); Matter of Rodriguez-Palma, 17 I&N Dec. 465 (BIA 1980); see also U.S. ex rel. Meyer v. Day, 54 F.2d 336 (2d Cir. 1931) (grand larceny); Brett v. INS, 386 F.2d 439 (2d Cir. 1967) (petit larceny); U.S. ex rel. Ventura v. Shaughnessy, 219 F.2d 249 (2d Cir. 1955) (receiving stolen property). Nevertheless, we disagree with the immigration judge's finding that the respondent's conviction and sentence renders her deportable under section 241(a)(4) of the Act.

The respondent moved for and obtained reconsideration of her first, 12-year sentence under the terms of Colorado Rule of Criminal Procedure 35(a), which provides as follows:

> Correction of Illegal Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

The Supreme Court of Colorado characterized this rule thusly:

> The rule allows the courts to reconsider in the interests of justice the sentence previously imposed, in the light of all relevant and material factors in the particular case which may or may not have been initially considered by the court and, in its sound discretion, to resentence the defendant to a lesser term within the statutory limits.
>
> It is the expectation that this rule will aid in minimizing aberrations in sentencing and will contribute to the imposition of more consistently uniform sentences for those convicted of like crimes.

People v. Smith, 536 P.2d 820, 822 (Colo. 1975), reh. denied July 7, 1975 (emphasis added); see also Spann v. People, 561 P.2d 1268 (Colo. 1977). Accordingly, it is clear that under Rule 35(a), by its very terms, a defendant's initial sentence is deemed to have been illegal and thus is regarded as void and of no force and effect. The trial court reconsiders the imposition of sentence and sentences the defendant anew. The new, reduced sentence stands as the only valid and lawful sentence imposed upon the defendant.

In view of the foregoing, we find that by operation of Colo. R. Crim. P. 35(a), the respondent's initial sentence of 12 years imprisonment is void and of no consequence, and her sentence is regarded as consisting solely of the legally-imposed 3 months imprisonment and 5 years probation. This sentence does not constitute a "sentence to confinement for a year or more" under section

241(a)(4) of the Act; therefore, the respondent's deportability under that charge cannot be upheld. Accordingly, the appeal will be sustained and these deportation proceedings terminated.

ORDER: The appeal is sustained and the proceedings are terminated.

MATTER OF M/V "CORAL SPRINGS"

In Fine Proceedings

MIA-10/12.1043

Decided by Board June 2, 1982

(1) The concept of "strict liability" does not apply until after it has been established that a carrier violated section 273 of the Immigration and Nationality Act, 8 U.S.C. 1323, by bringing undocumented aliens to the United States; however, once that has been established, the carrier's liability for fines is absolute.

(2) Section 273 does not make it unlawful to own a vessel that is used to bring undocumented aliens to the United States or impose a duty upon the owners of vessels to prevent their vessels from being used in that manner.

(3) Where a vessel has been used to bring undocumented aliens to the United States in violation of section 273 of the Act, it will be presumed that the owner of the vessel participated in the bringing of the aliens by permitting his vessel to be used to transport passengers to the United States, in the absence of evidence to the contrary.

(4) The owner has rebutted the presumption that he participated in the bringing of aliens to the United States where he establishes that his vessel was a commercial fishing vessel, that he employed the captain to use the vessel for fishing and not for any other purpose, that he did not know or have any reason to anticipate that the captain would use the vessel to transport passengers to the United States, and that when he learned that the captain intended to use the vessel for that purpose the owner did everything within his power to stop the captain from doing so.

(5) Under agency law principles, the captain's conduct in transporting alien passengers to the United States cannot be imputed to the owner where the captain, who was employed to fish, exceeded the scope of his employment by using the owner's vessel for a purpose distinct from fishing.

In re: M/V "CORAL SPRINGS," which arrived at Key West, Florida, from Cuba, on May 8, 1980. Alien passengers involved: JOSEFINA AROCHA-GARCIA, CIARA ALONSO-HERRERA, ADAN ALONSO-HERRERA, H. ALONSO-HERRERA, ELIO EMILIANO DIAZ-CARRAL, JOSE ANTONIO REYNALDO, et al.

BASIS FOR FINE: Act of 1952 - Section 273(a) [8 U.S.C. 1323(a)]

ON BEHALF OF CARRIER:
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ON BEHALF OF SERVICE:
Gerald S. Hurwitz
Appellate Trial
Attorney

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

In a decision dated May 1, 1981, the District Director imposed administrative fines totalling $250,000 upon Richard Young and V.J. O'Neal for 250 violations of section 273(a) of the Immigration and Nationality Act, 8 U.S.C. 1323(a). Mr. O'Neal has appealed. The appeal will be sustained.

The record indicates that Mr. Young, hereafter referred to as "the captain," departed for Cuba on April 27, 1980, from Key West, Florida, aboard a commercial fishing vessel known as the "Coral Springs." On May 8, 1980, he returned to the United States with 250 Cuban national passengers, all of whom were aliens who did not have unexpired visas or other valid entry documents. A Notice of Intention to Fine was served upon the captain on the day of his return from Cuba. On October 20, 1980, a second notice was served upon Mr. O'Neal as the owner of the Coral Springs. Mr. O'Neal will hereafter be referred to as "the owner." These notices alleged that the captain and the owner had violated section 273(a) of the Act by bringing undocumented aliens to the United States.

In a letter dated November 3, 1980, the owner denied liability for any violations of section 273(a) of the Act. 1/ According to the owner's letter, he did not know about the captain's voyage to Cuba until a friend called him and told him that the Coral Springs had departed for Cuba. In response to this information, he called the United States Coast Guard office at Key West and asked the officer on duty to stop the captain. The officer replied that he did not have authority to do that, and he advised the owner to contact the Monroe County sheriff's department. The owner then talked to an officer at the Monroe County sheriff's office. This officer explained that he would need a warrant for the captain's arrest to be able to stop him and that the sheriff's department had been advised by the District Attorney that none of the boat captains involved in the Cuban boatlift operations were being prosecuted for bringing Cubans to the United States. The owner concluded at this point that the situation was totally out of his hands, and he waited for the captain's return from Cuba, at which point he fired the captain immediately.

The District Director rejected the owner's defense on the ground that section 273(a) of the Act imposes strict liability.

On appeal, the owner emphasizes that the Coral Springs is a commercial fishing vessel and that he employed the captain to use it for fishing and not for any other purpose. The owner states further that he did not know that the captain intended to use the Coral Springs to transport aliens to the United States; that the captain commandeered the vessel to use it for that purpose without his knowledge; and that upon discovering that the captain had departed for Cuba, he did everything within his power to prevent him from reaching Cuba. The owner contends that he is completely innocent of any wrongdoing in this matter and that imposing a $250,000 fine upon him in these circumstances offends American concepts of due process and is fundamentally unfair.

1/ The captain also denied liability. The captain, however, has not appealed the District Director's decision. Therefore, the arguments that he raised will not be addressed in this decision.

In response to the owner's arguments on appeal, the Immigration and Naturalization Service advocates the position taken by the District Director that the owner's alleged innocence of wrongdoing is immaterial because section 273 of the Act imposes strict liability. The Service argues that fines are imposed under section 273 without regard to the intentions of the carrier and, therefore, that it does not matter whether the carrier knew that his vessel would be used to transport undocumented aliens to the United States. The Service contends that such liability is absolute to the extent that an owner of a vessel would even be liable if his vessel was stolen and then used to transport aliens while it was completely out of the owner's control. In the alternative, the Service contends that a finding of liability would be warranted in any event on the basis of agency law principles because of the employment relationship between the owner and the captain and the fact that the owner provided the captain with the instrumentality that he used to commit the violations.

We are not persuaded by the Service's argument that the owner is liable for fines under section 273 because liability under that section is absolute. Section 273 does not make it unlawful to own a vessel that is used to bring undocumented aliens to the United States, nor does it impose a duty upon the owners of vessels to prevent their vessels from being used in that manner. Compare section 271 of the Act, 8 U.S.C. 1321, which provides that it shall be the duty of every person bringing an alien to the United States to prevent the landing of such alien at a port of entry other than designated by the Attorney General. Section 273 proscribes the act of bringing undocumented aliens to the United States. The pertinent part of section 273 states that:

> It shall be unlawful for any person . . . to bring to the United States from any place outside thereof . . . any alien who does not have an unexpired visa, if a visa was required under this Act or regulations issued thereunder. (Emphasis added.)

The concept of "strict liability" does not apply until after it has been established that a carrier 2/ violated section 273 by bringing undocumented aliens to the United States. Once it has been established, however, that a carrier violated section 273, the carrier's liability for fines is absolute. It is not necessary in such a case to establish that the carrier knowingly violated section 273. Compare section 274 of the Act, 8 U.S.C. 1324, which includes "knowledge" as an element of a violation. Under section 273, the carrier is an insurer that its alien passengers have met the visa requirements of the Act. Any bringing to the United States of an alien who does not meet those requirements incurs liability. Matter of M/V "Emma," Interim Decision 2862 (BIA 1981); Matter of Swissair "Flight #164," 15 I&N Dec. 111 (BIA 1974). 3/

The owner did not participate directly in the act of bringing aliens to the United States; he did not go to Cuba and transport the aliens to the United States himself. Nevertheless, it is apparent that he was involved to some extent in that he provided the vessel which was used to bring the aliens to the United States. In the absence of evidence to the contrary, we will presume on the basis of such involvement that an owner participated in the act of bringing aliens by permitting his vessel to be used to transport them to this country. In this case, however, we find that the owner has rebutted that presumption.

2/ Some confusion has arisen over the significance of the term "carrier" in this context. That term does not appear in section 273, and it is not used to delineate a class of persons who are liable for violations of that section. It is used merely as a matter of convenience to designate the party or parties who have been charged with violations of section 273.

3/ Section 273(c) permits remission (forgiveness in full) in one circumstance: where it appears that prior to the departure of the vessel from the last port outside the United States, the carrier did not know, and could not have ascertained by the exercise of reasonable diligence that the individual transported was an alien and that a visa was required.

We are satisfied that the Coral Springs is a commercial fishing vessel, that the owner employed the captain to use it for fishing and not for any other purpose, and that the owner did not know or have reason to anticipate that the captain would use the Coral Springs to transport passengers to the United States from a foreign port. Furthermore, when the owner learned that his vessel had departed for Cuba, he did everything within his power to prevent it from reaching that port, and he fired the captain immediately upon his return to the United States. Finally, although the captain was the owner's employee and therefore an agency relationship existed between them, the captain's conduct was outside the scope of his employment and it was not done in behalf of the owner. On the basis of these findings, we conclude that the owner did not participate in the bringing of aliens to the United States aboard his vessel. Consequently, as the owner did not bring undocumented aliens to the United States, he is not liable for fines under section 273. Accordingly, the following order will be entered.

ORDER: The owner's appeal is sustained.

FURTHER ORDER: The fines imposed upon the owner by the District Director are cancelled, and the proceedings against the owner are terminated.

MATTER OF M/V "SNAIL'S PACE"

In Fine Proceedings

MIA-10/12.844

Decided by Board June 2, 1982

(1) In proceedings under section 273 of the Immigration and Nationality Act, 8 U.S.C. 1323, the term "carrier" is not used to delineate a class of persons who are liable for violations of that section, but it is used as a matter of convenience to designate the party or parties who have been charged with liability for fines.

(2) Section 273 of the Act does not make it unlawful to own a vessel that is used to bring undocumented aliens to the United States or impose a duty upon the owners of vessels to prevent their vessels from being used in that manner.

(3) Where a vessel has been used to bring undocumented aliens to the United States in violation of section 273 of the Act, it will be presumed that the owner of the vessel participated in the bringing of the aliens by permitting his vessel to be used to transport passengers to the United States, in the absence of evidence to the contrary.

(4) The owner has rebutted the presumption that he participated in the bringing of aliens to the United States, and hence is not liable for fines under section 273 of the Act, where he establishes that his vessel was chartered pursuant to a legitimate bareboat charter and that the charter was not entered into for the purpose of avoiding liability for fines under that section.

In re: M/V "SNAIL'S PACE," which arrived in the United States at the port of Key West, Florida, from Cuba, on May 5, 1980. Alien passengers involved: P. ROBERTO SANTIAGO, DANIEL LUGO-ILLAS, PEDRO ALFONSO GARCIA, JOSEFA VEGA-GARCIA, et al.

BASIS FOR FINE: Act of 1952 - Section 273(a) [8 U.S.C. 1323(a)]

ON BEHALF OF CARRIER:	ON BEHALF OF SERVICE:
Richard N. Watts, Esquire	Paul C. Vincent
P.O. Box 651	Appellate Trial
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BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

In a decision dated April 23, 1981, the District Director imposed administrative fines totalling $12,000 upon Robert V. Hehenberger, the captain of the vessel "Snail's Pace," and William Ermatinger, owner of the "Snail's Pace," for bringing 12 undocumented aliens to the United States in violation of section 273(a) of the Immigration and Nationality Act, 8 U.S.C. 1323(a). Hereinafter, Mr. Hehenberger will be referred to as "the captain," and Mr. Ermatinger will be referred to as "the owner." The owner has appealed. The appeal will be sustained.

The record indicates that on or about March 11, 1980, the owner chartered the "Snail's Pace" to the captain. On or about April 22, 1980, the captain made a voyage to Cuba. The purpose of the voyage was to transport 12 Cuban nationals to the United States. On May 5, 1980, the captain returned from Cuba with 35 alien passengers, none of whom had visas or other valid entry documents.

A Notice of Intention to Fine was served upon the captain on the day of his return from Cuba. The owner was served with a Notice of Intention to Fine on October 28, 1980. These notices alleged that the captain and the owner had violated section 273(a) of the Act by bringing undocumented aliens to the United States. The owner filed a written response to the notice in which he alleged that the "Snail's Pace" had been taken to Cuba without his knowledge or consent. The owner explained that he had chartered the vessel to the captain for a period of two to four weeks for fishing along the Florida coast; that he had tried unsuccessfully to locate the vessel after the charter had expired by calling friends and relatives of the captain; that the captain had not contacted him until April 22, 1980, at which point the captain had promised to return the vessel by April 28, 1980; that the vessel had not been returned at such time; and, finally, that he had not been informed that the captain intended to use the vessel to transport aliens to the United States until after the captain had left for Cuba.

The District Director noted the defenses raised by the owner and rejected them on the ground that they were not germane because the intent, motive, or mental state of one charged with a violation of section 273 is irrelevant to a determination of liability. The District Director, referring to the owner and captain jointly as "the carrier," found that they had brought 35 undocumented aliens to the United States and that they were, therefore, both liable for $35,000 in fines for 35 violations of section 273(a). Furthermore, the District Director found that remission of the fines under section 273(c) of the Act was not warranted. However, as a matter of discretion, the District Director decided to limit prosecution to 12 of the 35 violations because only 12 undocumented aliens were originally intended to be brought to the United States by the captain.

On appeal, the owner contends that he did not "bring" undocumented aliens to the United States in violation of section 273(a) of the Act and, therefore, that he is not liable for fines. In support of this contention, the owner argues that the term "bring" in section 273(a) requires active conduct on the part of, or on behalf of, the party charged and that, therefore, liability cannot be based upon merely owning a vessel that has been used to transport undocumented aliens. The owner disclaims any actual participation in the captain's voyage to Cuba. He emphasizes in this regard that his vessel was chartered to the captain pursuant to a bareboat charter on March 11, 1980, and that due to the nature of bareboat charters there was no agency relationship between them or any other basis for imputing the acts of the captain to him. The owner further contends that he and the captain do not share any legal identity and therefore that the term "carrier" should not be applied without distinction to both of them.

The Immigration and Naturalization Service has responded that owners of vessels used to bring undocumented aliens to the United States are strictly liable for fines under section 273 regardless of whether or not they participate in the bringing of the undocumented aliens. The Service would hold an owner liable despite the lack of any agency relationship or other basis for imputing the actions of a captain to the owner. Carrying this argument to its ultimate conclusion, the Service argues that an owner would be liable even if his vessel was stolen and then used by the thief to bring undocumented aliens to the United States.

The Service defines the term "carrier" as a composite of all classes of persons listed in section 273(a). 1/ In support of this position, the Service cites past decisions by this Board wherein we have used the term "carrier" to refer to both the owner and captain and have applied strict liability. 2/ The Service argues that it would be illogical to now hold that one part of the "carrier" (i.e. the captain) is liable and one part (i.e. the owner) is not. The Service further argues that the term "carrier" cannot be split into its separate parts without destroying its meaning. Finally, the Service argues that when the captain called from Key West on April 22, 1980, the owner knew or should have known what the captain was planning to do with the "Snail's Pace" and prevented it.

Before reaching the merits of the owner's contentions, two terms are in need of explanation. First, we must explain the significance of the term "carrier" in this context. That term does not carry the important legal significance which the Service attaches to it. "Carrier" does not appear in section 273, and we have not used it to delineate a class of persons who are liable for violations of that section. We have used it merely as a matter of convenience to designate the party or parties who have been charged with liability for fines.

The second term in need of an explanation is "bareboat charter." A "bareboat" or "demise" charter is created when the owner of a vessel completely and exclusively relinquishes possession, command and navigation of the vessel to the charterer. Guzman v. Pichirilo, 369 U.S. 698 (1962). "It is, therefore, tantamount to, though just

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1/ Section 273(a) imposes liability on "any person, including any transportation company, or the owner, master, commanding officer, agent, charterer, or consignee of any vessel or aircraft. . . ."

2/ Matter of M/V "Emma," Interim Decision 2862 (BIA 1981); Matter of M/V "Runaway," Interim Decision 2883 (BIA 1981).

short of an outright transfer of the ownership." *Guzman*, 369 U.S. at 700. The Supreme Court has emphasized that "the owner has the burden of showing such a charter. This burden is heavy for courts are reluctant to find a demise charter when the dealings between the parties are consistent with any lesser relationship." *Guzman*, 369 U.S. at 700. A leading treatise on Admiralty law states that a bareboat charter "in practical effect and in important legal consequence shifts the possession and control of the vessel from one person to another, just as the shoreside lease of real property shifts many of the incidents of ownership from lessor to lessee." G. Gilmore and C. Black, *The Law of Admiralty*, 239 (2d ed. 1975). In addition, "the most important consequences of the distinction between the demise and other forms of charters flow from the fact that the demise charterer is looked upon as the owner of the vessel *pro hac vice*. . . . The vessel, so far as third persons are concerned, is his vessel, and the men are his men; such of their defaults as are attributable to the owner and employer under respondeat superior doctrines are his to answer for." Gilmore and C. Black, *supra* at 242.

The characterization of the bareboat charterer as the owner *pro hac vice* of the vessel for the term of the charter has been repeatedly asserted by the Supreme Court of the United States in a long line of cases going back as far as 1814. 3/ In *Macardier* v. *The Chesapeake Ins. Co.*, 8 Cranch 39 (1814), Justice Story stated that, "A person may be owner for the voyage who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command and navigation of the ship." In keeping with this concept, it has frequently been held that a shipowner is isolated from liability by a bareboat charter.

With this background, we shall now consider the owner's contentions. To begin with, we reaffirm our long held position that fines under section 273 of the Act are imposed without regard to

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3/ *Reed* v. *The Yaka*, 373 U.S. 410 (1903); *Guzman* v. *Pichirilo*, 369 U.S. 698 (1962); *New Orleans-Belize Royal Mail and Central American Steamship Co.* v. *United States*, 239 U.S. 202 (1915); *United States* v. *Shea*, 152 U.S. 178 (1894); *Leary* v. *United States*, 81 U.S. (11 Wall.) 591 (1870); *Macardier* v. *The Chesapeake Ins. Co.*, 8 Cranch 39 (1814).

the intentions of the party charged. It is not necessary for there to be a willful disregard of United States law. Under section 273, a person who brings aliens to the United States becomes, in effect, an insurer that his alien passengers have met the visa requirements of the Act. Any bringing to the United States of an alien who does not meet those requirements incurs liability. *Matter of Swissair "Flight #164,"* 15 I&N Dec. 111 (BIA 1974); *Matter of M/V "Emma," supra*. Thus, there is strict liability for the bringing of undocumented aliens. However, it is important to emphasize that before the concept of strict liability can be applied, it must be shown that the person charged with a violation of section 273 *brought* undocumented aliens to the United States. The pertinent part of section 273 states that:

> It shall be unlawful for any person . . . *to bring* to the United States from any place outside thereof . . . any alien who does not have an unexpired visa, if a visa was required under this Act or regulations issued thereunder. (Emphasis added.)

Section 273 does not make it unlawful to own a vessel that is used to bring undocumented aliens to the United States, nor does it impose a duty upon the owners of vessels to prevent their vessels from being used in that manner. *Compare* section 271 of the Act, 8 U.S.C. 1321, which provides that it shall be the duty of every person bringing an alien to the United States to prevent the landing of such alien at a port of entry other than as designated by the Attorney General. Section 273 proscribes *the act of bringing* undocumented aliens to the United States.

The owner did not participate directly in the act of bringing aliens to the United States; he did not go to Cuba and transport the aliens to the United States himself. Nevertheless, it is apparent that he was involved to some extent in that he provided the vessel which was used to bring the aliens to the United States. In the absence of evidence to the contrary, we will presume on the basis of such involvement that an owner participated in the act of bringing aliens by permitting his vessel to be used to transport them to this country. In this case, however, we find that the owner has rebutted that presumption by establishing that he chartered his vessel to the captain pursuant to a bareboat charter.

It is said that the test for a bareboat charter is one of control. Gilmore and C. Black, supra at 240. The fundamental inquiry is, therefore, "has the shipowner surrendered virtually complete possession, control and navigation to the nonowner (charterer)?" Bishop v. United States, 476 F.2d 977, 979 (5th Cir. 1973). In establishing a bareboat charter, the words of the agreement are important, though not absolutely controlling, Complaint of Cook Transportation System Inc., 431 F.Supp. 437, 443 (W.D. Tenn. 1976), and in situations such as this one, where the charter is an oral agreement, its nature may be established by the circumstances of the case. St. Paul Fire and Marine Ins. Co. v. Vest Transportation Co., 666 F.2d 932, 939 (5th Cir. 1982).

In this case, the captain was not employed by, or under the direction of, the owner. Nor was the captain furthering the business interests of the owner. The record shows that the owner is a haberdasher and that the captain chartered the vessel for the purpose of fishing. In addition, the crew was not furnished by the owner, and it cannot be said that the owner in any way controlled or attempted to control the vessel during the term of the charter.

Occasionally courts have found sham bareboat charters. In such situations the purported charter is ignored and liability is assigned to the "real" owner of the vessel. See Stevens v. Seacoast Co., 414 F.2d 1032 (5th Cir. 1969). Here, the Service has not contested the existence of a bareboat charter or established a basis for suspecting that the bareboat charter was a sham arrangement designed by the owner to shield himself from liability for fines under section 273. It is significant in this regard that the charter was entered into on March 11, 1980, more than a month before the inception of the Cuban boatlift operation.

We find that the owner's ship was chartered to the captain pursuant to a legitimate bareboat charter and that the charter was not a sham arrangement designed by the owner to avoid liability for fines under section 273. We conclude, therefore, that the owner did not participate in the bringing of undocumented aliens to the United States aboard his vessel, the "Snail's Pace." As the owner did not bring undocumented aliens to the United States, he is not liable for fines under section 273. Accordingly, the following order will be entered.

ORDER: The owner's appeal is sustained.

FURTHER ORDER: The fines imposed upon the owner by the District Director are cancelled, and the proceedings against the owner are terminated.

MATTER OF PORTALES, et al.

In Exclusion Proceedings

A-24712281

Decided by Board May 14, 1982

(1) Cuban applicants, who were granted refugee status by Peru and were permitted to live and be employed without restriction in that country, are held to be firmly resettled in Peru prior to their arrival in the United States, and, therefore, not entitled to refugee status in this country.

(2) Notwithstanding the living and employment conditions experienced by the Cuban applicants in Peru, they are deemed firmly resettled in the absence of facts necessary to establish that the conditions of their residence were substantially and consciously restricted by the authorities of that country.

(3) In view of the fact that a grant of an applicant's request for asylum in the United States is limited to 1 year, subject to annual review, and may be terminated for several reasons including changed circumstances in the asylee's country, it is not significant as to the issue of resettlement that Peruvian refugee documents issued to the applicants were only valid for a 2-year period.

(4) An applicant whose request for asylum is granted does not enter the United States as a lawful permanent resident since that status is acquired, if at all, only after the alien has been physically present in the United States for at least 1 year from the date he was granted asylum.

EXCLUDABLE: Act of 1952 - Sec. 212(a)(20) [8 U.S.C. 1182(a)(20)] - Immigrants - not in possession of valid, unexpired immigrant visas or other valid entry documents

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ON BEHALF OF SERVICE:
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John C. Midanek
General Attorneys

Gerald S. Hurwitz
Appellate Trial Attorney

ORAL ARGUMENT: January 11, 1982

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

In a decision dated September 24, 1981, an immigration judge found the applicants excludable under section 212(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(20), as intending immigrants not in possession of valid immigrant visas or other valid entry documents, denied their requests for asylum and withholding of deportation, and ordered them excluded and deported. The applicants have appealed. The appeal will be dismissed.

Applicants, eight natives and citizens of Cuba (see Appendix), participated in the exodus from that country in the Spring of 1980 when they flew to Peru with approximately 400 other Cubans. The applicants lived in Lima, Peru, between April 1980 and September 16, 1981, when they departed on a commercial airline for Miami, Florida, seeking admission to the United States as refugees. As the applicants did not appear to the inspecting officers to be admissible, they were detained and placed in exclusion proceedings.

At their exclusion hearing, which began on September 18, 1981, and concluded on September 24, 1981, the applicants, who were represented by counsel, conceded excludability under section 212(a)(20) of the Act, admitting that they were aliens, that it was their intent to live and work in the United States, and that they did not have immigrant visas or other valid entry documents entitling them to enter this country. The applicants were properly found excludable under section 212(a)(20) of the Act. Matter of Castellon, 17 I&N Dec. 616 (BIA 1981).

The applicants renewed their requests for asylum, previously denied by the District Director, with the immigration judge, claiming persecution based on political opinion. [1] Their applications (Form I-589) reflect, with one exception, that neither the applicants nor any member of their families have ever been imprisoned or otherwise persecuted in Cuba, that they have not participated in any specific acts of political expression or organizations considered hostile to the interests of the Cuban government, and that with the exception of seeking asylum at the Peruvian Embassy in Havana in April 1980, they have never been politically active or expressed opposition to the Castro regime. One of the applicants was imprisoned for 5 years, between 1966 and 1971, for expressing his opposition to Castro and the Communist Party. He continued to live and work in Cuba following his release in 1971 without further incident. All of the applicants opposed the present government in Cuba and believed that they would be imprisoned if returned to that country because they sought asylum in the Peruvian Embasssy. Their applications further reflect that they were granted refugee status by Peru.

The record contains a State Department telegram from the American Embassy in Lima, Peru (Exhibit 16), which states that the applicants were given nonimmigrant resident refugee status, that with this status the applicants are entitled to work, attend school, practice their religion, and are required to pay taxes. It states that the refugee documents issued by Peru to the applicants were valid for 2 years. The telegram further states that the applicants are still considered refugees in Peru and are returnable to Peru as such.

The applicants testified that during the 16 months they lived in Peru the government provided the Cuban refugees there, including the applicants, with tents and food, and medical services were provided on an emergency basis only. They testified that the Peruvian economy was poor, that unemployment was high, and that they were not able to find employment or afford permanent housing. The applicants admitted that they could freely travel throughout Peru and were not prohibited from seeking employment. They also admitted that the conditions under which they lived in Peru were not the result of discrimination but rather the economic conditions of that country. They stated that they made no attempts to regularize their status in Peru, that it was not their intent to permanently reside there, and that they considered themselves transients ultimately destined for the United States.

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[1] An application for asylum under section 208(a) of the Act, 8 U.S.C. 1158(a), made after the institution of exclusion or deportation proceedings shall also be considered as a request for withholding of exclusion or deportation pursuant to section 243(h) of the Act, 8 U.S.C. 1253(h). 8 C.F.R. 208. See Matter of Rodriguez-Palma, 17 I&N Dec. 465 (BIA 1980).

At the conclusion of the hearing, the immigration judge denied the applicants' requests for asylum and withholding of deportation. He found that the applicants had not established that they would be persecuted if returned to Cuba. He further found that they had been firmly resettled in Peru, that they had been granted asylum in that country, and that they were therefore not eligible for the requested relief.

We conclude that the applicants' requests for asylum and withholding of deportation were properly denied. An applicant for asylum under section 208(a) of the Act must show that, if deported, he would be subject to persecution based on his race, religion, nationality, membership in a particular social group, or political opinion. To meet this burden of proof, an alien must demonstrate a clear probability that he will be persecuted if returned to his country or a well-founded fear of such persecution. 8 C.F.R. 208.5. See Matter of Dunar, 14 I&N Dec. 310 (BIA 1973).

The applicants have not shown that they will be persecuted if returned to Cuba. The mere assertion of persecution is not sufficient. Matter of Castellon, supra. The record reflects that neither applicants nor their families have been arrested, imprisoned, or otherwise persecuted in Cuba. It reflects that the applicants have not been politically active and have not participated in organizations considered hostile to the interests of the Cuban government. Although the applicants sought asylum in the Peruvian Embassy, they were issued valid passports and exit permits by the Cuban government and permitted to lawfully depart that country without incident. The only applicant who claimed that he was imprisoned for publicly expressing his opposition to the Castro regime has lived in Cuba since 1971 without further incident. We find no evidence that the applicants were persecuted nor a clear probability that they will be if returned to Cuba.

We further conclude that the applicants, prior to their arrival in the United States, were firmly resettled in Peru and that they are not entitled to classification as refugees. An alien is deemed firmly resettled if offered permanent resettlement by another country as a consequence of his flight from persecution, unless it is established that the conditions of his residence in that country have been substantially and consciously restricted by the authorities of that country. 8 C.F.R. 207.1(b), 208.8(f)(1)(ii), and 208.14. See Rosenberg v. Yee Chien Woo, 402 U.S. 49 (1971); Matter of Lam, Interim Decision 2857 (BIA 1981); Matter of Kwan, 14 I&N Dec. 499 (R.C. 1973).

The record establishes that the applicants sought asylum in the Peruvian Embassy in Havana, Cuba, and that as a result they were granted refugee status by Peru and flown out of Cuba. The Peruvian government provided the applicants with food, limited medical attention, and the only available living accommodations, a tent city. The applicants were permitted to freely travel throughout the country, were authorized to accept employment, attend school, and practice their religious preferences. They were issued refugee documents valid for 2 years. The applicants fled Cuba, claiming persecution. That claim was extinguished when they were granted refuge in Peru. Furthermore, there is no indication in the record that the Peruvian government intends to terminate the refugee status previously granted the applicants or that the refugee documents issued to them are not renewable.

The applicants argue on appeal that the living conditions they were subjected to in Peru, their inability to obtain suitable employment, and the 2-year limitation on the validity of their refugee documents clearly demonstrate that they were not firmly resettled. We disagree. The living conditions and inability to obtain employment experienced by the applicants appear related to Peru's ecomony, rather than the conscious restriction of benefits by the authorities of that country. The applicants were authorized to accept employment and it is not clear that they exhausted existing employment opportunities. Nor is it significant that the refugee documents issued the applicants were only valid for a 2-year period. A grant of an applicant's request for asylum in the United States is limited to 1 year, subject to annual review, and may be terminated for several reasons, including changed circumstances in the asylee's country. 8 C.F.R. 208.8(e), 208.10(e), and 208.15. An applicant whose request for asylum is granted does not enter the United States as a lawful permanent resident. That status is given, if at all, only after the alien has been physically present in the United States for at least 1 year from the date he was granted asylum. 8 C.F.R. 209.1 and 209.2.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

APPENDIX

A24 712 279	GONZALEZ, Sol Angel
A24 712 280	FERNANDEZ, Jose Luis
A24 712 281	PORTALES, Victor
A24 712 299	MARTINEZ, Pedro Danislao
A24 712 300	HERNANDEZ-Arencibia, Martha
A26 002 172	PEREZ-Aguiar, Carmen Nancy
A26 012 882	BARRERA-Perez, Niurka
A26 012 883	BARRERA-Perez, Marialys

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MATTER OF EXILUS

In Exclusion Proceedings

A-24720564

Decided by Board August 3, 1982

(1) The constitutional requirements of due process in an administrative proceeding vary according to the relative importance of the governmental and private interests involved; however, it is settled that such requirements are satisfied in an administrative hearing if the proceeding is found to be fair.

(2) The immigration judge's refusal to permit the asylum applicant to submit interrogatories to the State Department in connection with an advisory opinion rendered by that agency did not constitute a denial of due process where the significant impact of such submission upon the efficient functioning of the government outweighs the minimal benefit to be gained by the asylum applicant.

(3) Due process does not require the translation of an entire administrative hearing; however, certain portions of the hearing must be translated in order for the proceeding to be fair, and the immigration judge may also determine, in his discretion, if translation of other dialogue is essential to an alien's ability to assist in the presentation of his case.

(4) The immigration judge properly denied a motion for translation of the entire proceeding where all portions of the hearing after that denial were either translated or explained to the alien.

EXCLUDABLE: Act of 1952 - Sec. 212(a)(19) [8 U.S.C. 1182(a)(19)] - Procured visa by fraud

Act of 1952 - Sec. 212(a)(20) [8 U.S.C. 1182(a)(20)] - Not in possession of valid unexpired immigrant visa or other valid entry document

J 21. 11/2:

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ON BEHALF OF SERVICE:
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General Attorney

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

This case is before us on appeal from a decision of the immigration judge dated November 18, 1981, finding the applicant excludable and denying her application for asylum and withholding of exclusion and deportation. The appeal will be dismissed.

The applicant is a 21-year-old native and citizen of Haiti. The record reflects that she sought admission to the United States on September 7, 1981. The Service charged her with excludability under sections 212(a)(19) and (20) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(19) and (20).

At exclusion proceedings, the applicant conceded excludability on the advice of counsel. However, she sought relief from exclusion by submitting an application for asylum and withholding of exclusion and deportation. 1/ In conjunction therewith, she made two motions to the immigration judge. She requested that she be permitted to submit interrogatories to the person at the Bureau of Human Rights and Humanitarian Affairs of the Department of State who rendered an advisory opinion on her asylum claim. She also moved that the interpreter for the Service give a simultaneous translation of the entire proceedings, including all testimony, argument of counsel, and rulings and statements of the immigration judge. The immigration judge denied both motions. He further concluded that the applicant failed to establish that she has a

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1/ According to 8 C.F.R. 208.3(b), an asylum request made after the institution of exclusion proceedings shall also be considered as a request for withholding of exclusion and deportation pursuant to section 243(h) of the Act, 8 U.S.C. 1253(h).

well-founded fear of persecution if she returns to Haiti. Thus he found that she was not entitled to asylum or withholding of exclusion and deportation.

On appeal, the applicant contends that the immigration judge erred in refusing to permit her to submit the requested interrogatories and in denying her motion for simultaneous translation of the proceedings. She further argues that the immigration judge improperly denied her application for asylum and withholding of exclusion and deportation.

We shall address first the merits of the applicant's persecution claim. The law is well settled that an applicant for asylum or for withholding of exclusion and deportation bears the burden of proving that he has a well-founded fear of persecution if he returns to his native land. Fleurinor v. INS, 585 F.2d 129 (5 Cir. 1978); Martineau v. INS, 556 F.2d 306 (5 Cir. 1977); Henry v. INS, 552 F.2d 130 (5 Cir. 1977); Daniel v. INS, 528 F.2d 1278 (5 Cir. 1976). This language refers to more than the alien's subjective state of mind. He must establish that he is likely to be persecuted on account of his race, religion, nationality, membership in a particular social group, or political opinion. See Kashani v. INS, 547 F.2d 376, 379 (7 Cir. 1977); see also McMullen v. INS, 658 F.2d 1312 (9 Cir. 1981).

The applicant claims only that she will be persecuted because she left Haiti illegally. She admits she has never been arrested or imprisoned and makes no claim to have ever been a member of an organization hostile to her country's government or to have expressed a political opinion adverse to the authorities of that government. Although the applicant has submitted numerous magazine and newspaper articles, none relate to her individually or specifically support her claim that her illegal departure would result in persecution upon her return to Haiti. Furthermore, similar claims have been addressed and rejected as insufficient to establish a likelihood of persecution in Haiti without further substantial evidence that prosecution for an illegal departure would occur or would be politically motivated. Henry v. INS, supra; Matter of Williams, 16 I&N Dec. 697 (BIA 1979); cf. Coriolan v. INS, 559 F.2d 993 (5 Cir. 1977). We are not convinced by the applicant's bare allegations and the evidence presented that she would be persecuted in Haiti. Inasmuch as the applicant has failed to meet her burden of establishing the likelihood of persecution, we conclude that the immigration judge properly denied her application for asylum and witholding of exclusion and deportation.

The applicant argues that she was severely prejudiced by the immigration judge's refusal to allow submission of interrogatories. She asserts that the immigration judge's actions effectively denied her the opportunity to inspect, explain, and rebut the adverse evidence against her because she was precluded from determining how the State Department arrived at the conclusions in its advisory opinion. Thus the applicant claims that she was deprived of her due process right to a fair hearing.

Due process in an administrative proceeding is not defined by inflexible rules which are universally applied, but rather varies according to the nature of the case and the relative importance of the governmental and private interests involved. Mathews v. Eldridge, 424 U.S. 319 (1976); Richardson v. Perales, 402 U.S. 389 (1971); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); Blackwell College of Business v. Attorney General, 454 F.2d 928 (D.C. Cir. 1971); Matter of Swissair "Flight SR 168," 15 I&N Dec. 372 (BIA 1975). The constitutional requirements of due process are satisfied in an administrative hearing if the proceeding is found to be fair. See Martin-Mendoza v. INS, 499 F.2d 918 (9 Cir. 1974); Navarette-Navarette v. Landon, 223 F.2d 234 (9 Cir. 1955), cert. denied, 351 U.S. 911 (1956); Matter of De Vera, 16 I&N Dec. 266 (BIA 1977). In order to establish that he has been denied a fair hearing, an alien must show that he has suffered prejudice. Nicholas v. INS, 590 F.2d 802 (9 Cir. 1979).

We do not find that this applicant was denied a full and fair hearing as a result of her inability to submit interrogatories to the State Department. She complains only that she was precluded from determining how the State Department arrived at its conclusions. However, the letter itself clearly states that the opinion was based on the evidence she had submitted and the fact that the State Department had no other information to support her claim. The applicant was provided an opportunity to explain and rebut the conclusion in the State Department letter that she failed to establish a well-founded fear of persecution, yet she did not submit any evidence in rebuttal to the advisory opinion. Further, she has not specified any particular prejudice which resulted from the immigration judge's refusal to permit interrogatories, nor has she indicated how the submission of interrogatories would have advanced her claim of persecution. Consequently, we conclude that her exclusion hearing was fair.

Furthermore, as a general rule, we do not find that the refusal of an immigration judge to permit submission of interrogatories to the State Department constitutes a denial of due process. The regulations require that the advisory opinion rendered by the State Department must be included in the record and that the applicant for asylum must be given an opportunity to inspect, explain, or rebut it. See 8 C.F.R. 208.10(b); Matter of Saban, Interim Decision 2870 (BIA 1981); Matter of Francois, 15 I&N Dec. 534 (BIA 1975). The purpose in admitting the advisory opinion of the State Department into evidence at a hearing on an asylum claim is three-fold: (1) to establish compliance with the regulatory requirement of 8 C.F.R. 208.10(b); (2) to bring forth any information available to the State Department which supports the applicant's claim; and (3) to indicate the State Department's opinion regarding the likelihood of persecution given the specific facts presented by the applicant. We recognize that these opinions are ex parte declarations which are submitted without the traditional safeguards required of admissible evidence in judicial proceedings and that they are frequently general in nature. 2/ However, the opinion is not binding on the immigration judge and the Board and these factors are considered in determining the significance, if any, to be

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2/ The reliability of the opinions issued by the State Department involving asylum claims has been questioned in some court decisions. See Khalil v. District Director, 457 F.2d 1276 (9 Cir. 1972); Hosseinmardi v. INS, 405 F.2d 25 (9 Cir. 1968), petition for rehearing denied (1969); Kasravi v. INS, 400 F.2d 675 (9 Cir. 1968). However, their value as a source of information about the general conditions in foreign countries has been recognized and we know of no decision finding the admission of such opinions into evidence to be reversible error. See Zamora v. INS, 534 F.2d 1055 (2 Cir. 1976); Asghari v. INS, 396 F.2d 391 (9 Cir. 1968); Namkung v. Boyd, 226 F.2d 385 (9 Cir. 1955); United States ex rel. Dolenz v. Shaughnessy, 206 F.2d 392 (2 Cir. 1953); Matter of Francois, supra; see also Jaen v. INS, 564 F.2d 155 (3 Cir. 1977); Martineau v. INS, supra; Daniel v. INS, supra.

accorded an advisory opinion and in weighing its evidentiary value in relation to the evidence presented by the alien. See Matter of Williams, supra; Matter of Francois, supra.

The inclusion of the State Department opinion in the record was not intended to provide additional discovery procedures for the applicant for asylum. The burden of establishing the likelihood of his persecution rests with the applicant. 3/ Furthermore, the applicant is given ample opportunity to present evidence in rebuttal of any adverse information from the State Department. See 8 C.F.R. 208.10(b); Jaen v. INS, supra. Consequently, we are not persuaded that the denial of interrogatories unfairly prejudices the asylum applicant's ability to present his claim or that their submission would measurably improve it. Moreover we are not unmindful of the potential effect that the submission of interrogatories would have on the already heavy workload under which the State Department now labors. It is clear that this would also excessively prolong exclusion proceedings involving asylum claims. Balancing the significant impact that submission of interrogatories would be likely to have on the efficient functioning of the government against the minimal benefit that an asylum applicant may reap, we conclude that no denial of due process results from the absence of interrogatories. See Mathews v. Eldridge, supra.

We likewise reject the applicant's argument that the immigration judge's refusal to permit simultaneous translation of the entire proceedings denied her due process right to a fair hearing. 4/ The

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3/ Where the denial of an asylum claim has been based on the applicant's failure to present sufficient evidence of persecution, the courts have not found the absence of cross-examination or interrogatories to be prejudicial error. See Pereira-Diaz v. INS, 551 F.2d 1149 (9 Cir. 1977); Paul v. INS, 521 F.2d 194 (5 Cir. 1975); Hosseinmardi v. INS, supra.

4/ It is our understanding that in requesting "simultaneous translation" of the proceedings, the applicant did not intend for the translation to be made through the use of electronic equipment so that the interpretation is indeed simultaneous, but desired only to have the interpreter who was present at the hearing give a consecutive translation of the entire proceedings. Cf. United States v. Boria, 371 F.Supp 1068 (D.P.R. 1973).

applicant contends that she was prejudiced by her ability to understand only part of the hearing and by the immigration judge's delegation of authority to the interpreter to determine when translation was necessary. However, she has specified no particular injury which resulted from the alleged error and has failed to set forth the untranslated portions of the hearing which she believes required translation.

Our review of the transcript indicates that the applicant's attorney submitted his motions only after admitting the allegations against the applicant and conceding her excludability. Subsequent to the immigration judge's denial of the motions, the remainder of the proceeding consisted only of questions directed to the applicant and her responses, all of which were translated by the interpreter. 5/ Although the immigration judge asked counsel for the applicant if he desired a translation of the decision, counsel stated that he would explain it to the applicant himself. There was consequently no part of the hearing after submission of the motions which was not either translated or explained to the applicant, so neither of her arguments has any basis in fact. Her contention that she was denied a fair hearing is therefore completely without merit. See Ramirez v. INS, 550 F.2d 560 (9 Cir. 1977); Orozco-Rangel v. INS, 528 F.2d 224 (9 Cir. 1976); cf. Tejeda-Mata v. INS, 626 F.2d 721 (9 Cir. 1980); Tapia-Corona v. United States, 369 F.2d 366 (9 Cir. 1966).

Although an alien in exclusion or deportation proceedings is entitled to a fair hearing, we do not find that due process requires translation of the entire hearing. In most cases, all that need be translated are the immigration judge's statements to the alien, the examination of the alien by his counsel, the attorney for the Service, and the immigration judge, and the alien's responses to their

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5/ We note that the examination of the applicant regarding her asylum claim was comprised of only three questions asked by her counsel and two by the attorney for the Service. In response to her attorney's questions, the applicant stated that she left Haiti illegally and that she would be beaten or killed by government officials if she returned. The only information elicited as a result of the Service's attorney's questions related to her date and place of birth and her marital status.

questions. However, the immigration judge may determine, in the sound exercise of his discretion, that the alien's understanding of other dialogue is essential to his ability to assist in the presentation of his case. *Cf.* *United States* v. *Barrios*, 457 F.2d 680 (9 Cir. 1972); *United States* v. *Carrion*, 488 F.2d 12 (1 Cir. 1973), *cert. denied*, 416 U.S. 907 (1974); *United States* v. *Rodriguez*, 424 F.2d 205 (4 Cir.), *cert. denied*, 400 U.S. 841 (1970); *United States* v. *Sosa*, 379 F.2d 525 (7 Cir.), *cert. denied*, 389 U.S. 845 (1967); *Suarez* v. *United States*, 309 F.2d 709 (5 Cir. 1962). For example, where a witness testifies regarding factual matters which specifically relate to the alien's own testimony, effective cross-examination may necessitate translation of the witness's testimony. *See* *Tejeda-Mata* v. *INS*, *supra*; *United States* v. *Carrion*, *supra*; *United States ex rel. Negron* v. *State of New York*, 434 F.2d 386 (2 Cir. 1970); *Gonzalez* v. *People of Virgin Islands*, 109 F.2d 215 (3 Cir. 1940). On the other hand, arguments presented by counsel and the rulings of the immigration judge are primarily legal matters, the translation of which generally would not be required where the alien is represented and the protection of his interests is ensured by counsel's presence.

Exclusion and deportation proceedings are civil, rather than criminal, in nature, and the constitutional requirements of due process are satisfied by a full and fair hearing. *Tejeda-Mata* v. *INS*, *supra*; *Ramirez* v. *INS*, *supra*. We believe that the above-stated guidelines, when implemented by the immigration judge in the sound exercise of his discretion, reasonably assure that the alien will be afforded a fair hearing which comports with the standards of due process. In this case, the judgment of the immigration judge to deny the applicant's motion for simultaneous translation was appropriate.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

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MATTER OF ST. PIERRE

In Visa Petition Proceedings

DET-N-18298

Decided by Regional Commissioner June 30, 1982

(1) The purpose of the beneficiary's internship is to learn survey and laboratory procedures in industrial hygiene. This training will consist primarily of on-the-job training, as the subject matter by its very nature can only be learned in that setting. Since the beneficiary will not receive any payment from the petitioner, and will merely be observing field tests and not actively conducting them, he will not be engaging in productive employment which would displace a resident worker. Matter of Kraus Periodicals, 11 I&N Dec. 63 (R.C. 1964). See 8 C.F.R. 214.2(h)(2)(ii).

(2) The beneficiary will not be employed in a position which is in the normal operation of a business and in which citizens and resident aliens are regularly employed. Matter of Miyaki Travel Agency, Inc., 10 I&N Dec. 644 (R.C. 1964).

(3) The beneficiary was granted a paid educational sabbatical by his employer, the University of Windsor. After the one year training program ends, the beneficiary will return to his teaching position at the university. Thus the beneficiary is not being trained for eventual employment in the United States, as was found impermissable in Matter of Glencoe Press, 11 I&N Dec. 764 (R.C. 1966).

(4) The field of industrial hygiene has developed in the United States significantly further than it has in other countries as a result of the Federal Occupational Safety and Health Act of 1970. The petitioner has therefore demonstrated that the proposed training is not available abroad as required by Matter of Treasure Craft of California, 14 I&N Dec. 190 (R.C. 1972).

ON BEHALF OF PETITIONER: John E. English, Esquire
English & van Horne, P.C.
4472 City National Bank Bldg.
Detroit, Michigan 48226

This matter is before me on appeal from the District Director's decision of August 3, 1981, denying the petition to classify the beneficiary as a nonimmigrant trainee in accordance with section 101(a)(15)(H)(iii) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1101(a)(15)(H)(iii). The appeal will be sustained.

The petitioner is an environmental consulting firm established in 1954 and located in Southfield, Michigan. Its business is to help industry and government identify and solve pollution problems. It has 65 employees and annual sales of $2.5 million. The beneficiary is a 44-year-old native and citizen of Canada. He is a professor of Chemical Engineering at the University of Windsor. He asked for and was granted an educational sabbatical with pay, of one year by his university in order to study industrial hygiene in the United States.

The beneficiary made application to the petitioner in 1980 for a one-year internship to learn survey and laboratory procedures in industrial hygiene such as:

> Evaluation of worker exposure to toxic chemicals such as lead, silica, benzene, and other potential cancer-causing chemicals.
>
> Evaluation and control of noise in the workplace.
>
> Evaluation and control of other physical stresses, such as radiation and heat and cold stress in industrial work environments.
>
> Development of new controls and procedures for minimizing/eliminating workplace hazards.

The petitioner accepted the beneficiary as an intern because of his superior credentials: Ph.D from Northwestern University in Chemical Engineering (1965), engineering consultant and university professor since 1965. The beneficiary wanted to take his training with the petitioner in Southfield, Michigan because it was the only laboratory with facilities to provide industrial hygiene training close to Windsor.

The petitioner had had five intern-trainees in the past and was training one at the time this petition was filed. The beneficiary will not receive any payment from the petitioner. Thus the suggestion of productive employment which would displace a resident worker which was noted in Matter of Kraus Periodicals, 11 I&N Dec. 63 (R.C. 1964), is absent. The beneficiary will continue to receive his professor's salary from the University of Windsor. He will return to his employment there at the end of one years's training. Thus the beneficiary is not being trained for eventual employment in the United States which was found impermissible in Matter of Glencoe Press, 11 I&N Dec. 764 (R.C. 1966).

Although the beneficiary's training is primarily on-the-job training, no productive labor will be involved because the beneficiary will be merely observing, not conducting field tests. The petitioner states that:

> Industrial hygiene, by its very nature, can only be learned in the work setting. It involves chemicals, noise, dust, gas and vapor measurement and testing done at the work site. Laboratory and office procedures involve research and evaluation of field tests and procedures. Thus it can only be learned by going into the field with trained professionally qualified regular company personnel.

However, the beneficiary will not be displacing a resident worker by his participation in this training program as required by Matter of Treasure Craft of California, 14 I&N Dec. 190 (R.C. 1972). The petitioner states that the beneficiary:

> . . . will "tag along" on most field testing . . . he will perform little or no actual testing as most of the test procedures are performed under strict governmental reporting and sign-off requirements . . . . Obviously, the company could not jeopardize the credibility of its report by having [the beneficiary, an intern] do such work. The field work he would do is

> thus, in fact, extra or make-work work for his use and benefit only. He would be the third man on a normal two man crew which would only need two men.

Thus the beneficiary will not, as required by Matter of Miyaki Travel Agency, Inc., 10 I&N Dec. 644 (R.C. 1964), "be employed in a position which is in the normal operation of a business and in which citizens and resident aliens are regularly employed" (id. at 645).

I am satisfied that training in Industrial Hygiene is not available abroad as required by Matter of Treasure Craft of California, supra. The petitioner states that:

> Industrial hygiene in the United states is the outgrowth of procedures and technology developed under the standards and specificiations of Federal Occupational Safety and Health Act of 1970 and the various statutes and regulations enacted in implementation thereof. The United States procedures and technology are vastly different than any other country . . . . There is in fact no similar or even related training in Canada.

I find that all the requirements of 8 C.F.R. 214.2(h)(2)(iii) (1981) and the precedent decisions relating to the H-3 classification have been met. The petitioner has specifically described a training program which will prepare the beneficary to return to his position as Professor of Chemical Engineering with a sub-specialty in environmental engineering — a field just developing in Canada. The petitioner has demonstrated that this training is not available in Canada and must be taken here. The petitioner has established that the beneficiary will not be engaged in productive employment that might displace a resident worker [see 8 C.F.R. 214.2(h)(2)(ii)(1981)].

Therefore, I conclude that this training program is a suitable one by which a beneficiary may be classified as a nonimmigrant trainee under section 101(a)(15)(H)(iii) of the Act.

ORDER: The appeal is sustained and the petition is approved.

MATTER OF SALIM

In Exclusion Proceedings

A-26110301

Decided by Board September 29, 1982

(1) Asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. 1158, denied as a matter of discretion to excludable alien who arrived in the United States with a fraudulent passport, despite grant of temporary withholding of deportation to Afghanistan pursuant to section 243(h) of the Act, 8 U.S.C. 1253(h). Under the Refugee Act of 1980, 243(h) relief to eligible aliens is mandatory, but asylum is discretionary.

(2) The applicant's deportation to Afghanistan is temporarily withheld pursuant to section 243(h) because that country is one of the countries to which the applicant may now be deported pursuant to section 237(a) of the Act, 8 U.S.C. 1227(a), as amended by the Immigration and Nationality Act Amendments of 1981. Deportation to Pakistan is not withheld because 243(h) relief is "country specific" and no likelihood of persecution in Pakistan has been established.

(3) Applicant sufficiently established that he may be singled out for persecution in his native Afghanistan for opposing the ongoing Russian invasion and refusing to join the Soviet controlled Afghan army in its war against the Afghan rebels opposing the invasion. State Department Bureau of Human Rights and Humanitarian Affairs (BHRHA) opinion supporting the alien's persecution claim given significant weight.

(4) In close persecution cases such as those in which the State Department BHRHA agrees with the applicant's fears of persecution, the immigration judge should ordinarily consider the discretion aspects of the asylum application to avoid a remand solely on that issue.

EXCLUDABLE:
Order: Act of 1952 - Sec. 212(a)(19) [8 U.S.C. 1182(a)(19)] - Entered the United States by fraud or by willfully misrepresenting a material fact

Sec. 212(a)(20) [8 U.S.C. 1182(a)(20)] - Not in possession of a valid unexpired visa or other valid entry document

ON BEHALF OF APPLICANT:
Barbara A. Nelson, Esquire
c/o Arthur Pollack, Esquire
225 Broadway
New York, New York 10007

ON BEHALF OF SERVICE:
Joanna London
Acting Appellate
Trial Attorney

BY: Milhollan, Chairman; Maniatis, Dunne, and Morris, Board Members. Concurring and Dissenting Opinion, Vacca.

The applicant appeals from the March 24, 1982, decision of the immigration judge denying his applications for asylum pursuant to section 208 of the Immigration and Nationality Act, 8 U.S.C. 1158, and temporary withholding of deportation pursuant to section 243(h) of the Act, 8 U.S.C. 1253(h). The appeal will be sustained in part and dismissed in part. The immigration judge's decision will be modified so as to deny the application for political asylum as a matter of discretion but grant the application for temporary withholding of deportation to Afghanistan.

The applicant's excludability under section 212(a)(19) and 212(a)(20) of the Act, 8 U.S.C. 1182(a)(19) and 1182(a)(20), is not at issue and was conceded at the exclusion hearing on March 24, 1982 (Tr. p. 1). The applicant arrived in the United States from Pakistan on February 18, 1982, with someone else's passport which he had fraudulently purchased in order to obtain a visa as a nonimmigrant visitor for business. See section 101(a)(15)(B)(1), 8 U.S.C. 1101(a)(15)(B)(1). He appeals from the immigration judge's conclusion that he had not established the requisite well-founded fear of persecution in his native Afghanistan 1/ and therefore was ineligible for asylum and temporary withholding of deportation. The immigration judge reached that conclusion despite a State Department Bureau of Human Rights and Humanitarian Affairs (BHRHA) advisory opinion dated March 12, 1982, that the applicant had established a well-founded fear of persecution in his native country (Ex. 4).

1/ Under section 7 of the Immigration and Nationality Act Amendments of 1981, Pub. L. 97-116, 95 Stat. 1611 (Dec. 29, 1981), Afghanistan is one of the countries to which the applicant may be deported pursuant to section 237(a) of the Act, 8 U.S.C. 1227(a). The previous language limited deportation to the "country whence he came," Pakistan. The applicable portions of the newly enacted section read as follows:

> (1) Any alien . . . arriving in the United States who is excluded shall be . . . deported . . . to the country in which the alien boarded the . . . aircraft on which he arrived in the United States. . . .
>
> (2) If the government of the country designated in paragraph (1) will not accept the alien into its territory, the alien's deportation shall be directed by the Attorney General, in his discretion and without necessarily giving any priority or preference because of their order as herein set forth, either to--
>
> (A) the country of which the alien is a subject, citizen, or national;
>
> (B) the country in which he was born;
>
> (C) the country in which he has a residence; or
>
> (D) any country which is willing to accept the alien into its territory, if deportation to any of the foregoing countries is impracticable, inadvisable, or impossible.

We agree with the applicant that he has established the requisite probability of persecution in Afghanistan. 2/ The applicant contended that he had been a member of the Mujahidin rebels in Kandahar and that two of his brothers have been arrested by the Soviet controlled Babrak regime for similar membership. Another brother was taken by Russian troops at Kandahar, and the applicant does not know his whereabouts or whether he is still alive (Ex. 3). The immediate reason for his fleeing Afghanistan was that he refused to join the Soviet controlled Afghan army in its war against Afghan rebels presently fighting against the Soviet invasion (Tr. p. 3).

The State Department BHRHA conclusion that the applicant would be persecuted is consistent with its report on Afghanistan in the 1981 Country Reports on Human Rights Practices at 929, 931, Joint Committees of the Senate and House of Representatives, 97th Congress, 1st Session (1981). 3/ The report emphasizes that due to mass desertion by Afghan soldiers who refuse to fight under Soviet command against their compatriots, the army resorts to dragooning and forcibly impressing into its forces men and boys as replacements. This clearly differs from persecution claims by aliens who merely seek to avoid military service in their country. See Kovac v. INS, 407 F.2d 102 (9 Cir. 1969). Under the facts of this case, we attach significant weight to the State Department's conclusion that this applicant would be persecuted if returned to Afghanistan. Consequently, we conclude that the applicant has established a well-founded fear of persecution despite the immigration judge's conclusion to the contrary. The immigration judge's specific finding that the applicant left Afghanistan for mere economic reasons (i.j. dec. p. 3) apparently stemmed from a misunderstanding of the applicant's testimony that he came to the United States seeking

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2/ We therefore do not reach the applicant's contentions regarding Stevic v. Sava, 678 F.2d 401 (2 Cir. 1982); Cf. Matter of Dunar, 14 I&N Dec. 310 (BIA 1973).

3/ A State Department BHRHA opinion supporting an alien's contention that he will be persecuted in his native country should be given significant weight, particularly where supporting evidence and testimony supports such a conclusion. See Matter of Saban, Interim Decision 2870 (BIA 1981); Matter of Francois, 15 I&N Dec. 534 (BIA 1975).

employment (Tr. p. 7). That statement was a repetition of his immediately preceding testimony that he left Pakistan because he could not support his family left behind in Afghanistan, while unemployed in Pakistan (Tr. p. 6). It was not an explanation of why he left Afghanistan.

Having concluded that the applicant established the requisite likelihood of persecution, a grant of temporary withholding of deportation to Afghanistan is required in this case pursuant to section 243(h) of the Act as amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (March 17, 1980). That section now specifies that "the Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened on account of . . . political opinion." Under section 243(h) as drafted prior to the 1980 Amendment such relief was discretionary. 4/

We next address the question of asylum which section 208(a) of the Act provides is discretionary in nature. It specifically states that an alien applicant "may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) of the Act, 8 U.S.C. 1101(a)(42)(A)." (Emphasis supplied). Once it is determined that the requisite probability of persecution has been established for section 243(h) relief, such a conclusion is also binding on the issue of persecution for purposes of asylum under section 208 of the Act. Matter of Lam, Interim Decision 2857 (BIA 1981). Therefore, the applicant's statutory eligibility for asylum has been established. However, the Service contends that the application for political asylum in the United States should be denied as a matter of discretion due to the circumstances of his arrival in the United States with a fraudulently purchased passport bearing someone else's name. Similarly, the State Department BHRHA recommended in its advisory letter that the asylum application be denied for policy considerations since the

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4/ The previous language of section 243(h) read: "the Attorney General is authorized to withhold deportation." The case before us does not involve any issue of ineligibility for relief under the grounds set forth in section 243(h)(2). Moreover, this applicant is not deportable under the provision of section 241(a)(19) of the Act.

applicant misused our immigration laws to gain an advantage over all other similarly situated Afghan refugees in Pakistan who are following the established procedures for legally immigrating to the United States.

This Board has not previously considered the exercise of discretion in asylum cases where it was found that the alien would be persecuted if returned to his native country. Until May 1979 neither immigration judges nor this Board addressed asylum claims, as jurisdiction to adjudicate asylum applications then lay exclusively with the District Directors. The immigration judges and this Board only had jurisdiction to consider applications for withholding of deportation under section 243(h). Effective May 19, 1979, however, the regulations gave authority to immigration judges and this Board to consider asylum applications made after the commencement or completion of deportation proceedings. See 8 C.F.R. 108.3. Interim regulations promulgated pursuant to the Refugee Act of 1980 similarly provide that asylum applications made after the institution of exclusion or deportation proceedings shall be considered by immigration judges. See 8 C.F.R. 208.3(b) (effective June 1, 1980). In view of this Board's recent acquisition of jurisdiction over asylum claims and the revision of the laws in this area in 1980, many issues raised before the Board relating to asylum are issues of first impression.

The language in section 208(a) specifying the discretionary nature of asylum relief is clear, and since that section was enacted subsequent to the 1967 protocol it controls over any conflicting language in the protocol under the applicable rules of statutory interpretation. Consequently, under the present statute an otherwise eligible 5/ alien whom the Attorney General determines that his life or freedom would be threatened in his native country

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5/ Aliens who persecuted others abroad and specified classes of criminals are precluded from obtaining 243(h) relief. See Matter of Rodriguez-Palma, 17 I&N Dec. 465 (BIA 1980); Matter of Martinez-Rivero, Interim Decision 2884 (BIA 1981); Matter of Ballester-Garcia, 17 I&N Dec. 592 (BIA 1980); Compare, Matter of Frentescu, Interim Decision 2906 (BIA 1982).

on account of race, religion, nationality, membership in a particular social group, or political opinion is entitled to 243(h) relief and may also be granted asylum relief, but only as a matter of discretion.

Section 243(h) relief is "country specific" and accordingly, the applicant here would be presently protected from deportation to Afghanistan pursuant to section 243(h). But that section would not prevent his exclusion and deportation to Pakistan or any other hospitable country under section 237(a) if that country will accept him. 6/ In contrast, asylum is a greater form of relief. When granted asylum the alien may be eligible to apply for adjustment of status to that of a lawful permanent resident pursuant to section 209 of the Act, 8 U.S.C. 1159, after residing here one year, subject to numerical limitations and the applicable regulations. See 8 C.F.R. 209. Considering this relationship between asylum and 243(h) relief, we now examine the discretionary factors in this case.

As stated above, the Board had never before considered a discretionary denial of asylum relief. However, the lack of direct precedents does not mean that useful guidelines are unavailable. For example, 8 C.F.R. 208.8(f)(1) precludes the District Director from granting asylum relief to specific classes of applicants, and 8 C.F.R. 208.8(f)(2) states that the District Director shall consider all relevant factors such as whether an outstanding offer of resettlement is available to the applicant in a third country and the public interest involved in the specific case. The regulations, in essence, summarize the specific preclusions in the Act against aliens who persecuted others abroad with this Board's and the judicially developed principles for the exercise of discretionary relief from deportation. See Rosenberg v. Woo, 402 U.S. 49 (1971). Although those regulations are addressed to the District Director and are not binding on this Board, we consider them as useful guidelines in the exercise of discretion over asylum requests.

6/ Section 237(a). See note 1 above.

Attempting entry into the United States by way of fraudulently obtained documentation has consistently been considered a strong negative discretionary factor. See Balami v. INS, 669 F.2d 1157 (6 Cir. 1982). This applicant is excludable under section 212(a)(19) of the Act. We note that section 212(a)(19) excludability would require a waiver pursuant to section 209(c), 8 U.S.C. 1159(c), for refugee adjustment of status cases. 7/ Finally, as the Service and the State Department letter suggested, the public interest requires that we do not condone this applicant's attempt to circumvent the orderly procedures that our government has provided for refugees to immigrate lawfully. The fraudulent passport was obtained after the applicant had escaped from Afghanistan, with the sole purpose of reaching this country ahead of all the other refugees awaiting their turn abroad. This is not the case where an alien was forced to resort to fraudulently obtained documentation in order to escape or prevent being returned to the country in which he fears persecution. See Matter of Ng, 17 I&N Dec. 536 (BIA 1980). This Board finds that the fraudulent avoidance of the orderly refugee procedures that this country has established is an extremely adverse factor which can only be overcome with the most unusual showing of countervailing equities. This case before us does not present such equities. Consequently, the application for asylum relief will be denied as a matter of discretion.

A final issue remains in this case. At oral argument counsel for this applicant argues that if asylum is denied as a matter of discretion on the basis of the record before us, a remand for a further finding on the discretionary issue should be ordered. He contends that the applicant has been cooperating with United States authorities combating the growing use of the subterfuge of obtaining fraudulent passports to improperly obtain nonimmigrant visas abroad, fly into the United States and file asylum applications.

7/ Under the terms of section 209(c), the provisions of sections 212(a)(14), (15), (20), (21), (25), and (32), do not apply to an alien seeking adjustment of status under section 209. The Attorney General "may waive any other provision of such section (other than paragraphs (27), (29), or (33) and other than so much of paragraph (23) as relates to trafficking in narcotics) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." (Emphasis added).

First, we note that no evidence has been offered to that effect. No government official recommends that his alleged cooperation be considered favorably in this asylum application so as to overcome the heavily negative factors in this case. In any event, attempting to enter the United States by using fraudulent documents is a felony pursuant to 18 U.S.C. 1546. By cooperating with United States authorities in their investigation this alien might gain clemency from such authorities and avoid prosecution. More importantly, even if we accept the representation in this regard as true, such cooperation is not a sufficient significant factor to warrant granting asylum relief as a matter of discretion in this case. The motion to remand will accordingly be denied.

We finally note that the record of unfavorable discretionary factors was unusually well documented in this case, and therefore, sufficiently ripe for our review. In close persecution cases, however, such as those in which the State Department BHRHA agrees with an applicant's fears of persecution, the immigration judge should ordinarily consider the discretion aspects of the asylum case to avoid a remand solely on that issue.

ORDER: The appeal from the denial of asylum relief will be dismissed, the appeal from the denial of 243(h) relief to Afghanistan will be sustained and the motion to remand denied.

FURTHER ORDER: The applicant is excluded and deported to Pakistan.

FURTHER ORDER: The applicant's deportation to Afghanistan pursuant to sections 237(a)(2)(A) and (B) if the government of Pakistan refuses to accept his deportation to that country pursuant to section 237(a)(1), will be temporarily withheld as provided by section 243(h) of the Act.

CONCURRING and DISSENTING OPINION: Fred W. Vacca, Board Member

I respectfully concur in part and dissent in part.

The immigration judge found the applicant excludable under section 212(a)(19) and (20) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(19) and (20), as an immigrant who procured his visa by fraud and who was not in possession of a valid unexpired visa or other necessary documents at the time of his application for admission to the United States. The applicant applied for asylum under section 208 of the Act, 8 U.S.C. 1158, and withholding of deportation under section 243(h) of the Act, 8 U.S.C. 1253(h). The immigration judge denied his applications. The applicant appealed. In its decision, the majority of the members of the Board of Immigration Appeals dismissed the appeal from the denial of asylum relief, sustained the appeal from the denial of withholding of deportation, and denied the applicant's motion to remand the record of proceedings. The majority ordered the applicant excluded and deported to Pakistan and further ordered that the applicant's deportation to Afghanistan be temporarily withheld as provided in section 243(h) of the Act. I concur in the conclusions of the majority that the applicant is excludable as charged, that his asylum application should be denied and that his motion to remand should be denied. However, I do not agree that the applicant has met his burden of establishing statutory eligibility for withholding of deportation and believe that the majority erred by granting that relief.

The record reveals that the applicant is a 27-year-old native and citizen of Afghanistan who entered Pakistan in January of 1982 and resided there for less than one month. The applicant departed Pakistan and arrived in the United States on February 18, 1982. In support of his applications for asylum and withholding of deportation, the applicant testified at his hearing that he left Afghanistan because he is an anti-communist and feared that the existing government would incarcerate or otherwise harm him because he refused to join the government's army. He further testified that he belonged to a rebel organization in Afghanistan known as the "Mujahidin" and that he aided that organization by distributing leaflets and papers. The applicant related that two of his brothers were employed by the previous regime in Afghanistan, that they opposed the present regime, and that because of that opposition they were imprisoned by that government. The applicant also stated that another brother went into the Russian Army, that he has not heard from him since that time, and that he does not know the whereabouts of that brother. The applicant testified that he left his family in Afghanistan when he went to Pakistan. He also stated that he departed Pakistan for the United States because he did not desire to live in Pakistan, that there was nothing for him to do there, and that he did not have enough money to buy land in Pakistan. Apart from his testimony, and his written application for asylum, the applicant offered no other evidence to support his claim.

A letter from the Bureau of Human Rights and Humanitarian Affairs, Department of State, dated March 12, 1982, is of record. That letter which was written at the request of the Immigration and Naturalization Service informs the reader that since the 1979 Soviet invasion of Afghanistan, more than three million Afghans fled into neighboring countries where they have obtained temporary refuge. The State Department letter contains no specific information relating to the applicant or his activities in Afghanistan. It did contain the opinion that the applicant has established a well-founded fear of persecution in Afghanistan. However, it is clear from a reading of the letter that this opinion was predicated upon the assumption that the information provided by the applicant in his application for asylum (Form I-589) is true. It does not appear that the opinion was based on specific, independent information known to the Department of State.

An applicant for asylum or withholding of deportation must show that, if deported, he would likely be subject to persecution based on his race, religion, nationality, membership in a particular social group, or political opinion. Section 208(a) of the Act. See section 243(h) of the Act; Matter of McMullen, 17 I&N Dec. 542 (BIA 1980), rev'd on other grounds, 658 F.2d 1312 (9 Cir. 1981). An undocumented assertion or an apprehension which is purely subjective is not sufficient to support a persecution claim under the statute. An applicant must present objective evidence that he has a well-founded fear that he is likely to be singled out for persecution by government officials in the country of deportation. See McMullen v. INS, supra; Kashani v. INS, 547 F.2d 376 (7 Cir. 1977); Stevic v. Sava, 678 F.2d 401 (2 Cir. 1982); Matter of Chumpitazi, 16 I&N Dec. 629 (BIA 1978).

Upon a review of this record, I find that the applicant has failed to establish his persecution claim. The transcript of the minutes of the exclusion hearing shows that only the applicant testified. Apart from the submission of his asylum application, no other documents were furnished by the applicant in support of his claim. I find not a single item of probative, objective evidence in the record to satisfactorily corroborate the applicant's story. The applicant's testimony is that he is an anti-communist, that he refused to join the Afghan army and that, for these reasons, he believes he would be in danger from the present regime in Afghanistan if returned to that country. The record, however, contains no corroborative evidence of a particularized nature to establish that he was politically active in Afghanistan, that he opposed the present government in that country or, for that matter, that he fled Afghanistan to avoid service in the army.

A letter of the Department of State relating to a persecution claim is admissible into evidence in these proceedings. Pereira-Diaz v. INS, 551 F.2d 1149 (9 Cir. 1977); Matter of Francois, 15 I&N Dec. 534 (BIA 1975). However, such letters are advisory in nature and not binding on the Board of Immigration Appeals. Matter of Exilus, Interim Decision 2914 (BIA 1982). The weight to be accorded an advisory opinion will be determined by examining its probative quality. In this case, the advisory opinion contains no particularized information concerning the applicant or his activities in Afghanistan. The letter is also devoid of specific reasons for the opinion other than the expressed reliance on the assumption that the applicant's story is true. In view of these circumstances, I find that the advisory opinion has little or no probative value and, therefore, I choose not to rely upon it in my consideration of the applicant's claim for withholding of deportation. The reliance of the majority on the advisory opinion of the Department of State and the 1981 Country Reports on Human Rights Practices, Joint Committees of the Senate and House of Representatives, 97th Congress, 1st Session (1981) 1/ is, in my view, unwarranted in light of the generalized nature of the opinion and the report and the fact that the applicant has offered nothing more than a bare and unsubstantiated claim of persecution.

1/ I note that the Country Reports on Human Rights Practices cited by the majority in its decision do not identify the applicant or relate specifically to the applicant or his activities in Afghanistan.

For the above reasons, I would find that the applicant has not met his burden of proof and would deny his applications for asylum and withholding of deportation. Accordingly, I would dismiss his appeal and deny his motion to remand the record of these proceedings.

MATTER OF RUIS

In Deportation Proceedings

A-31199203

Decided by the Board September 30, 1982

(1) Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), relates to any entry made by an alien who fails to submit to inspection.

(2) A lawful permanent resident's deportability for entering without inspection may not be prevented by his subsequent departure and readmission to the United States upon presention of an Alien Registration Receipt Card.

(3) The immigration judge improperly terminated deportation proceedings against a lawful permanent resident who entered the United States without inspection and subsequently departed and returned with his Alien Registration Receipt Card.

CHARGE:
Order: Act of 1952 - Sec. 241(a)(2) [8 U.S.C. 1251(a)(2)] - Entered without inspection

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Vincent Agresti, Esquire 56-58 Ferry Street Newark, New Jersey 07105	Joanna London Acting Appellate Trial Attorney

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

The Immigration and Naturalization Service has appealed from a decision of the immigration judge dated May 28, 1981, terminating the proceedings against the respondent. The appeal will be sustained and the record will be remanded to the immigration judge.

The respondent is a 41-year-old native and citizen of Colombia who was admitted to the United States as a lawful permanent resident on May 24, 1970. The record reflects that he left this country in order to return to Colombia and reentered surreptitiously from Mexico on January 4, 1978, in order to accompany his fiancee who was without proper documentation. The respondent was apprehended and on January 9, 1978, was convicted on a plea of guilty for aiding and abetting his fiancee to make an illegal entry in violation of 18 U.S.C. 2 and 8 U.S.C. 1325.

On September 5, 1978, the Service issued an Order to Show Cause charging the respondent with deportability under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), for entering the United States without inspection. The record reflects that the respondent departed from the United States on March 24, 1979, and returned the next day, obtaining admission as a returning resident on the basis of his Alien Registration Receipt Card (Form I-151). The respondent claims that he also went to Colombia on June 10, 1979, and was readmitted on September 7, 1979.

On March 27, 1979, the respondent appeared for his deportation hearing and denied deportability. During the proceedings, he contended that he was no longer subject to deportation on the basis of his entry without inspection because he had subsequently made an entry as a lawful permanent resident.

The immigration judge terminated the proceedings, concluding that section 241(a)(2) only applied to the last entry made by an alien and that the respondent's entries in March and September of 1979 with his Form I-151 eliminated entry without inspection as a ground of deportability. In reaching this decision, the immigration judge relied on two 1965 cases issued by the Board which were not precedent decisions. Matter of Romero, A10 553 849 (BIA June 8, 1965); Matter of Gutierrez, A8 405 405 (BIA June 11, 1965). From these unpublished cases the immigration judge reasoned that a lawful permanent resident alien who had entered without inspection could avoid deportability by making a subsequent entry with his Form I-151. He further dismissed the Service's contention that only a new visa application made with full disclosure of the respondent's entry without inspection would eliminate his deportability.

On appeal, the Service argues that the immigration judge improperly terminated proceedings because the respondent should not be permitted to thwart the immigration laws by making an entry with his Form I-151 solely to prevent deportation on the entry without inspection charge. It is further contended that the immigration judge's reliance on the unpublished Board cases is misplaced.

The issue before us, whether a deportation charge of entry without inspection relates only to the alien's last entry, appears to be one of first impression. The two unpublished Board decisions cited by the immigration judge do not mandate the result sought by the respondent. 1/ First, in Matter of Rina, A13 197 621 (BIA April 25, 1978), the Board withdrew from the relevant language in the two cases, finding it to have been improvident. Furthermore, the cases did not stand for the proposition that only an alien's most recent entry can be the basis for an entry without inspection charge. Accordingly, the unpublished decisions cited by the immigration judge are not controlling on the question before us.

Section 241(a)(2) of the Act provides for the deportation of any alien in the United States who:

> entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States.

The clear objective of this section is to protect the integrity of the boundaries of the United States by requiring every alien to submit to inspection by immigration officials each time he enters this country. See Ex parte Callow, 240 F. 212 (D. Colo. 1916); 1A C. Gordon and H. Rosenfield, Immigration Law and Procedure section 4.8b (1982); see also, H.R. Rep. No. 1377, 82nd Cong., 2d Sess., reprinted in, [1952] U.S. Code Cong. & Ad. News 1358, 1360. The law requires not only that aliens be admissible to the United States, but that all entries be made pursuant to an inspection at

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1/ We note that only decisions designated for publication by the Board serve as precedents in other proceedings involving the same issue or issues. See 8 C.F.R. 3.1(g).

an appropriately designated time and place. This statutory mandate is not satisfied by the fact that an alien may have been admissible had he properly presented himself for inspection or that he was subsequently inspected and permitted to enter.

Nothing in the language of section 241(a)(2) indicates that Congress intended to limit its applicability to the most recent entry made by an alien. In this regard, we think it significant that, with respect to other sections of the statute, any entry may provide the basis for deportation. See Belfrage v. Kenton, 224 F.2d 803 (2 Cir. 1955); Matter of C-, 4 I&N Dec. 596 (C.O. 1952, BIA 1953); but see Bonetti v. Rogers, 356 U.S. 691 (1958) (membership in Communist party); Matter of Medina, 15 I&N Dec. 611 (BIA 1976), aff'd Medina-Luna v. INS, 547 F.2d 1171 (7 Cir. 1977); Matter of C-, 5 I&N Dec. 370 (BIA 1953) (two crimes involving moral turpitude); Matter of S-, 7 I&N Dec. 536 (BIA 1957) (failure to notify Attorney General of address); Matter of P-, 5 I&N Dec. 651 (BIA 1954) (narcotics conviction); see also section 101(a)(13) of the Act, 8 U.S.C. 1101(a)(13). The disposition of Congress to extend, rather than limit, the applicability of this section is also reflected by the elimination in the 1952 Act of previous statutory time limitations on deportation after an entry without inspection. See sections 241(a)(2) and (d) of the Act; cf. Act of Feb. 5, 1917, sec. 19(a), 39 Stat. 874; see also Barber v. Hong, 254 F.2d 382 (9 Cir. 1958); Matter of A-, 6 I&N Dec. 540 (BIA 1955). Furthermore, the seriousness with which Congress regarded the act of entering the United States without inspection is evidenced by the fact that criminal penalties have also been provided for the violation of that offense. See section 275 of the Act, 8 U.S.C. 1325; see also H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 60, reprinted in, [1952] U.S. Code Cong. & Ad. News 1653, 1715.

With these considerations in mind, we conclude that section 241(a)(2) of the Act relates to any entry made by an alien who fails to submit to inspection. Consequently, we find that the respondent's deportability for entering without inspection is not prevented by the mere fact that he departed and returned with his Form I-151. To hold otherwise would be to thwart the policies underlying the Act and to provide an opportunity for aliens to violate our immigration laws with impunity.

We need not decide at this time whether an alien who has entered the United States without inspection will be forever subject to deportation in all circumstances. 2/ See generally Matter of Rafipour, 16 I&N Dec. 470 (BIA 1978); Matter of Sanchez, 16 I&N Dec. 363 (BIA 1977); Matter of R-G-, 8 I&N Dec. 128 (BIA 1958); Matter of S-, supra. Under the facts presented in this case, however, we conclude that the immigration judge improperly terminated the proceedings. The respondent remains deportable for entering without inspection because his subsequent departure and return with a Form I-151 does not eliminate the grounds of deportability.

Accordingly, the decision of the immigration judge will be reversed and the record will be remanded to the immigration judge for further proceedings.

ORDER: The appeal is sustained. The decision of the immigration judge is reversed and the record is remanded for further proceedings consistent with the foregoing opinion and the entry of a new decision.

2/ We would note in this regard that the Service has prosecutorial discretion to decline to pursue the deportation of an alien who has entered the United States without inspection despite his possession of documents. See Operations Instructions 235.9; see also section 101(a)(13) of the Act.

MATTER OF BROWN

In Deportation Proceedings

A-30085015

Decided by the Board September 30, 1982

(1) Deportation proceedings which have been commenced against an alien are not nullified by his temporary absence from the United States as long as the allegations and charges stated in the Order to Show Cause continue to be applicable.

(2) The Immigration and Naturalization Service need not issue a new Order to Show Cause when an alien under deportation proceedings departs from the country if upon his return he is still deportable on the same grounds stated in the Order to Show Cause.

(3) A lawful permanent resident who has applied in deportation proceedings for a waiver of deportability under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), and subsequently departs from the United States may resume the application in those proceedings upon his return.

CHARGE:
Order: Act of 1952 - Sec. 241(a)(11) [8 U.S.C. 1251(a)(11)] - Convicted of a narcotics violation

ON BEHALF OF RESPONDENT:
Joseph F. O'Neil, Esquire
116 Lincoln Street
Boston, Massachusetts 02111

ON BEHALF OF SERVICE:
Frederick J. McGrath
General Attorney

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

The Immigration and Naturalization Service has appealed from a decision of the immigration judge dated May 5, 1982, terminating deportation proceedings. The appeal will be sustained and the record will be remanded for further proceedings.

The respondent is a 25-year-old native and citizen of Jamaica who was admitted to the United States on May 27, 1973, as a lawful permanent resident. The record reflects that he was convicted on June 3, 1980, in the District Court of Springfield, in Springfield, Massachusetts, for possession of marijuana.

On August 28, 1980, an Order to Show Cause was issued charging the respondent with deportability under section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(11), for having been convicted of a narcotics violation. At deportation proceedings conducted on May 11, 1981, the respondent conceded deportability and applied for a waiver of deportation pursuant to section 212(c) of the Act, 8 U.S.C. 1182(c). The hearing was continued for an investigation regarding that application.

At resumed proceedings on May 5, 1982, the respondent testified that he had departed from the United States on August 19, 1981, for a visit to Jamaica. The immigration judge terminated deportation proceedings, concluding that the Service was required to institute new proceedings as a result of the respondent's departure from the United States. He further stated that by leaving the country the respondent abandoned his application for section 212(c) relief.

We find that the immigration judge erred in terminating the proceedings in this case. Deportation proceedings previously commenced against an alien are not nullified by his temporary absence from the United States. The reason for issuance of an Order to Show Cause is to inform an alien of the deportation charges against him and to notify him that he must show why he should not be deported. See 8 C.F.R. 242.1(b). As long as the allegations and charges stated in the Order to Show Cause continue to be applicable, the alien remains subject to deportation. He cannot compel the termination of deportation proceedings which have been commenced against him merely by effecting a departure and reentry. Consequently, we do not find it mandatory that the Service issue a new Order to Show Cause when an alien departs from the country if upon his return he is still deportable on the same grounds stated in the Order to Show Cause. This ruling does not, however, preclude the Service from electing to issue a new Order to Show Cause when appropriate.

Furthermore, we conclude that the respondent's application for section 212(c) relief could properly be resumed upon his return to the United States. See Matter of Lok, Interim Decision 2878 (BIA 1981). Requiring him to file another application would serve no useful purpose in this case. Accordingly, the record will be remanded to the immigration judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

ORDER: The record is remanded to the immigration judge for further proceedings.

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MATTER OF GUNAYDIN and KIRCALI

In Deportation Proceedings

A-20355205
A-23431315

Decided by the Board October 27, 1982

(1) The status of a lawful permanent resident who has entered the United States without inspection terminates only when the adjudication of his deportability becomes final in administrative proceedings. Matter of M-, 5 I&N Dec. 642 (BIA 1954), modified.

(2) A conviction for a deportable offense does not terminate the status of a lawful permanent resident.

(3) A lawful permanent resident alien who entered the United States without inspection is not deportable upon subsequent reentry with a Form-151 under section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), as being excludable under section 212(a)(20) of the Act, 8 U.S.C. 1182(a)(20), for lack of a valid visa.

CHARGE:
Order: Act of 1952 - Sec. 241(a)(1) [8 U.S.C. 1251(a)(1)] - Excludable at entry under sec. 212(a)(20), I&N Act (8 U.S.C. 1182(a)(20)) - No valid visa (Both respondents)

ON BEHALF OF RESPONDENTS:
Brian S. Lafferty, Esquire
56-58 Ferry Street
Newark, New Jersey 07105

ON BEHALF OF SERVICE:
Joanna London
Acting Appellate
Trial Attorney

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

In a decision dated January 27, 1982, the immigration judge found the respondents deportable under section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), as aliens who were excludable at entry under section 212(a)(20) of the Act, 8 U.S.C. 1182(a)(20), for lack of a valid immigrant visa. The respondents have appealed from that decision. The record will be remanded to the immigration judge.

The respondents are both natives and citizens of Turkey who have been accorded status as lawful permanent residents of the United States. The record reflects that they left the United States to go to Canada on September 5, 1981, and, according to their own admissions, they reentered this country on September 7, 1981, without submitting to inspection. On September 8, 1981, both respondents were convicted of entering the United States without inspection in violation of 8 U.S.C. 1325.

Orders to Show Cause were issued against the respondents on September 7, 1981, charging them with deportability under section 241(a)(2) of the Act, 8 U.S.C. 1251(a)(2), for entering without inspection. On October 29, 1981, the respondents departed from the United States on the advice of counsel for the admitted purpose of seeking readmission as lawful permanent residents. The respondents returned to the United States on October 30, 1981, and reentered the country upon presentation of their Alien Registration Receipt Cards (Form I-151). The Service issued new Orders to Show Cause on November 4, 1981, charging the respondents with deportability under section 241(a)(1) of the Act for excludability at entry under section 212(a)(20).

At deportation proceedings, the respondents admitted each of the allegations of the Orders to Show Cause but denied deportability. They contended that as a matter of law they were not deportable for entering without a valid immigrant visa because they were properly admitted as lawful permanent residents at the time of their October 30, 1981, entry which, they further asserted, terminated their deportability for entry without inspection. The Service relied on Matter of M-, 5 I&N Dec. 642 (BIA 1954), to support its position that by making an entry without inspection the respondents automatically terminated their lawful permanent resident status so as to render their visas invalid.

In concluding that the respondents were not in possession of valid immigrant visas when they made their second entry the immigration judge declined to rely on Matter of M- alone, but determined that the respondents' convictions constituted a sufficient adjudication of their status to terminate their permanent residence.

In Matter of M-, supra, the Board stated in dicta that, in view of the alien's entry without inspection, "it can no longer be said that his [lawful permanent resident] status has not changed. . . ." Subsequent to that decision, we determined that an act which provides the basis for a lawful permanent resident alien's deportability does not itself terminate his status. See Matter of Salmon, 16 I&N Dec. 734 (BIA 1978); Matter of M-P-, 9 I&N Dec. 747 (BIA 1962); Matter of S-, 6 I&N Dec. 392 (BIA 1954, A.G. 1955); see also Matter of Mosqueda, 14 I&N Dec. 55 (R.C. 1972). Furthermore, in Matter of Lok, Interim Decision 2878 (BIA 1981), we held that an alien's lawful permanent resident status ends as a result of his commission of a deportable offense only upon the entry of a final order of deportation. 1/ In light of these decisions, we believe that the language of Matter of M-, supra, relating to a change of lawful permanent resident status was improvident. Therefore, we shall withdraw from the dicta in that case to the extent that it indicates that an entry without inspection automatically results in the termination of lawful permanent resident status. We now hold that the status of a lawful permanent resident who has entered the United States without inspection terminates only when the adjudication of his deportability becomes final in administrative proceedings. We find no reason to reach a contrary conclusion where a conviction for a deportable offense has occurred.

We conclude that the respondents were not deportable under section 241(a)(1) as aliens excludable under section 212(a)(20) at the time of their entry. Therefore, the charge upon which the immigration judge found the respondents deportable has not been sustained.

1/ We noted in our decision that lawful permanent resident status may also change as a result of rescission, relinquishment, departure under an order of exclusion or deportation, and adjustment to nonimmigrant status. See Matter of Lok, supra, at n. 8.

However, the respondents were also charged with deportability for their entry without inspection in the Orders to Show Cause of September 7, 1981, which remain in effect. See Matter of Brown, Interim Decision 2923 (BIA 1982). We shall accordingly remand the record to the immigration judge for further proceedings to determine respondents' deportability under section 241(a)(2) of the Act. See Matter of Ruis, Interim Decision 2924 (BIA 1982).

ORDER: The record is remanded to the immigration judge for further proceedings consistent with the foregoing opinion.

MATTER OF DUARTE

In Exclusion Proceedings

A-19078551

Decided by Board November 1, 1982

(1) The United States domicile of one who retains his lawful permanent resident status must be considered lawful.

(2) The lawful permanent resident status of an alien is terminated as a result of his commission of an excludable act or the occurrence of an excludable event only upon the entry of a final administrative order of exclusion and deportation. Matter of Lok, Interim Decision 2878 (BIA 1981), followed.

(3) An alien who enters the United States while in an excludable class prior to accruing 7 years as a lawful permanent resident does not thereby lose his lawful status nor his eligibility for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c). Matter of M-, 7 I&N Dec. 140 (BIA 1956), overruled. Dicta in Matter of Hinojosa, 17 I&N Dec. 34 (BIA 1979) and 17 I&N Dec. 322 (BIA 1980), superseded.

EXCLUDABLE: Act of 1952 - Sec. 212(a)(23) [8 U.S.C. 1182(a)(23)]-
Convicted of violation of a law relating to the illicit possession with intent to distribute marijuana

ON BEHALF OF APPLICANT:
Frederick Hetter, Esquire
2220 Fifth Avenue
San Diego, California 92101

ON BEHALF OF SERVICE:
Harold J. Neubauer
General Attorney

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

In a decision dated April 15, 1981, an immigration judge found the applicant excludable under section 212(a)(23) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(23), denied as a matter of law his application for relief under section 212(c) of the Act, 8 U.S.C. 1182(c), and ordered him excluded and deported from the United States. The applicant has appealed from that decision.

The applicant, a 32-year-old native and citizen of Mexico, was admitted to the United States for lawful permanent residence on July 25, 1969. In the spring of 1970, he returned to Mexico where he resided until August 1974, crossing the border regularly to work in this country as a migrant farm worker. The applicant married a Mexican citizen in 1971 and has two sons by that marriage who are also citizens of Mexico. The applicant's wife and children never immigrated to the United States.

On August 14, 1974, approximately 79 pounds of marijuana were discovered in the applicant's automobile as he sought to reenter the United States. He was paroled into the United States for prosecution and on November 4, 1974, was convicted of a violation of 21 U.S.C. 841(a)(1), to wit, possession of a controlled substance with intent to distribute. The applicant was sentenced to serve 120 days of a 3-year term of imprisonment pursuant to that conviction, the balance of the term suspended with probation conditioned upon his returning forthwith to Mexico and not entering the United States without permission. Upon his release from confinement, the applicant was met by officers of the Immigration and Naturalization Service who returned him to Mexico without instituting exclusion proceedings.

According to his testimony, the applicant returned to the United States in January 1975, entering without inspection, and remained in this country to the time of his exclusion hearing. He visited Mexico about four times a year, reentering the United States without inspection on each occasion. In December 1979, after his criminal probation had expired, the applicant applied for admission to the United States. These exclusion proceedings ensued. [1] On appeal, the applicant does not challenge the immigration judge's finding of excludability but appeals solely from the denial of section 212(c) relief.

Section 212(c) of the Act provides in pertinent part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraph (1) through (25) and paragraphs (30) and (31) of subsection (a). . . .

The immigration judge found that the applicant had lost his lawful permanent resident status prior to the hearing and, hence, could not establish statutory eligibility for section 212(c) relief. He cited alternative rationales for his holding: (1) that the applicant's lawful permanent resident status ended when he entered without inspection (see Matter of M-, 5 I&N Dec. 642 (BIA 1954)) and (2) that such status terminated when the applicant departed and reentered the United States within the first 7 years of acquiring lawful permanent residence subsequent to an act or event that rendered him excludable (see Matter of M-, 7 I&N Dec. 140 (BIA 1956); Matter of Hinojosa, 17 I&N Dec. 34 (BIA 1979) and 17 I&N Dec. 322 (BIA 1980)).

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[1] We find this case distinguishable from the Ninth Circuit's decision in Plasencia v. Sureck, 637 F.2d 1286 (9 Cir. 1980), and therefore conclude that the applicant was properly placed in exclusion, not deportation, proceedings. The court in Plasencia held that where there is a question as to whether the visit abroad of a lawful permanent resident was "meaningfully interruptive" of the alien's United States residence so as to subject him to the consequences of an "entry," the issues of "entry" and excludability must be litigated in deportation proceedings. In the present case, however, the applicant's criminal conviction for trafficking in marijuana conclusively resolves that question against him. See Matter of Contreras, Interim Decision 2859 (BIA 1981).

In a recently published case, Matter of Gunaydin, Interim Decision 2925 (BIA 1982), we retreated from our decision in Matter of M-, 5 I&N Dec. 642 (BIA 1954), to the extent that decision has been understood to hold that an entry without inspection automatically terminates an alien's lawful permanent resident status. We found that proposition inconsistent with and superseded by subsequent Board precedents which held that an act or event which provides a basis for an alien's deportation does not in itself terminate his lawful permanent resident status but, rather, that such status ends as a result of his commission of a deportable offense only upon the entry of a final administrative order of deportation. See Matter of Lok, Interim Decision 2878 (BIA 1981), aff'd, Lok v. INS, 681 F.2d 107 (2 Cir. 1982); Matter of Gunaydin, supra.

We turn now to the alternative basis for the immigration judge's decision. Matter of Hinojosa, 17 I&N Dec. 34 (BIA 1979) and 17 I&N Dec. 322 (BIA 1980), the only precedent decisions which discussed Matter of M-, 7 I&N Dec. 140 (BIA 1956), in its 26-year history, distinguished the case on the facts. The holding in Matter of M-, id., is now squarely before us. As we find the present Matter of M-, like the Volume 5 case of the same name, incompatible with subsequent case law, we shall withdraw from our holding therein and from the dicta in Matter of Hinojosa, supra.

In Matter of M-, the Board held that a lawful permanent resident who departed and reentered the United States while in the state of being inadmissible had no "lawful domicile" in this country from the date of that entry and could not thereafter accumulate time toward the satisfaction of the 7-year "lawful unrelinquished domicile" requirement of section 212(c). Thus, an alien who had not completed 7 years as a lawful permanent resident at the time of an entry made subsequent to an act or event giving rise to excludability, and hence could not qualify for a section 212(c) waiver at the time of such entry, was forever barred from establishing eligibility for relief under section 212(c). That result followed notwithstanding the fact that there had been no adjudication of the alien's excludability until after the 7-year period had elapsed.

In Matter of Lok, supra, the Board observed that the United States domicile of one who retains his lawful permanent resident status must be considered lawful. 2/ We then proceeded to consider the point in the deportation proceedings at which the status of an alien lawfully admitted for permanent residence comes to an end by reason of the act or event that rendered him deportable. We concluded that the alien retains his lawful status until a final administrative order of deportation has been entered in his case. The rule in Lok, announced in the context of deportation proceedings, applies as well to an alien in exclusion proceedings. As the applicant in the instant case is not now under a final administrative order of exclusion and deportation and does not appear to have been otherwise divested of his lawful permanent resident status, 3/ we find that such status continues to exist to the present time, as does the lawfulness of his domicile if he in fact is domiciled in the United States. Our contrary holding in Matter of M-, i.e., that an alien who enters while in an excludable class prior to accruing 7 years of lawful permanent residence thereby loses his lawful status and his eligibility for section 212(c) relief, is herewith overruled.

2/ It is, of course, possible for a lawful permanent resident, e.g., a commuter, to have a domicile in another country. See Matter of Carrasco, 16 I&N Dec. 195 (BIA 1977), aff'd sub nom. Carrasco-Favela v. INS, 563 F.2d 1220 (5 Cir. 1977). If he is domiciled in the United States, however, his domicile is lawful so long as he retains his lawful permanent resident status.

3/ Lawful permanent resident status may also be lost through abandonment, intentional or unintentional; rescission of adjustment of status; adjustment to nonimmigrant status; or the alien's departure from the United States under an order of deportation or an order of exclusion and deportation. Matter of Lok, supra, at n. 8.

We note parenthetically the critical significance Matter of M- attached to an "entry." Such emphasis on the comings and goings of a lawful permanent resident would appear inappropriate in light of Francis v. INS, 532 F.2d 268 (2 Cir. 1976), 4/ a decision adopted by the Board in Matter of Silva, 16 I&N Dec. 26 (BIA 1976). See Matter of Hinojosa, 17 I&N Dec. 322, 324 (BIA 1980).

Deciding that the applicant retains his lawful permanent resident status and thus is not precluded by its termination from establishing statutory eligibility for a section 212(c) waiver does not dispose of the case. A question remains whether the applicant was domiciled in the United States for the requisite period. It is clear that the applicant was a commuter prior to his arrest in August 1974 and that his domicile until that time was in Mexico, not the United States. See generally Matter of Sanchez, 17 I&N Dec. 218 (BIA 1980); Matter of Hoffman-Arvayo, 13 I&N Dec. 750 (BIA 1971). The location of his domicile since his reentry in January 1975 is not, however, discernible from the record presently before us. Inasmuch as we conclude that a favorable exercise of discretion is not warranted in this case, it will not be necessary to remand the record for further development of the question. See generally INS v. Bagamasbad, 429 U.S. 24 (1976).

We regard the applicant's crime, which involved trafficking in a large quantity of marijuana, to be an extremely serious negative factor that has not been overcome by a showing of unusual or outstanding countervailing equities. See generally Matter of Marin, 16 I&N Dec. 581 (BIA 1978). The presence in the United States of the applicant's mother and brother is not in itself sufficient to

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4/ Section 212(c) by its terms applies only to excludable aliens seeking to enter the United States. However, the court in Francis, supra, finding no rational basis for drawing a distinction between an alien who departed and returned and an alien who remained in this country following the act or event giving rise to deportability, held that section 212(c) relief cannot constitutionally be denied an alien solely because he had not departed the United States and hence had made no reentry after becoming deportable.

outweigh the serious adverse factor militating against a grant of relief. The applicant has failed to demonstrate any other substantial equities. His wife and children reside in Mexico. The applicant himself has spent a considerable amount of time in his native country since his admission to the United States.

An applicant for relief under section 212(c) bears the burden of establishing that his application merits favorable consideration. Matter of Marin, supra. As we find that the applicant has not successfully met that burden, the appeal will be dismissed.

ORDER: The appeal is dismissed.

MATTER OF MATELOT

In Exclusion Proceedings

A-26007558

Decided by Board November 1, 1982

(1) An immigration judge's refusal to admit as evidence findings of fact that are contained in a reported federal decision does not deprive an alien of the opportunity to fully present an asylum claim.

CHARGE:
Order: Act of 1952 - Sec. 212(a)(20) [8 U.S.C. 1182(a)(20)] - Immigrant not in possession of valid unexpired immigrant visa or other valid entry document

ON BEHALF OF APPLICANT:
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Brown, Bucalos, and Gardner
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Lexington, Kentucky 40507

ON BEHALF OF SERVICE:
Debra Gordon
General Attorney

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

This matter is before the Board on appeal from the immigration judge's decision of December 9, 1981, finding the applicant excludable from admission to the United States under section 212(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(20), and denying his application for asylum under section 208 of the Act. 1/ The appeal will be dismissed.

The applicant is a 27-year-old native and citizen of Haiti who arrived in the United States on July 14, 1981, by boat near Miami, Florida. He had no documents with which to enter the United States and was held in detention by the Service. On September 1, 1981, he was served with Form I-122, "Notice to Applicant for Admission Detained for Hearing Before Immigration Judge," alleging that he was excludable for admission to the United States under section 212(a)(20) of the Act as an immigrant not in possession of a valid immigrant visa. Following his initial two hearings before the immigration judge which were continued to permit the applicant to have counsel prepared and to submit an asylum application, the applicant filed Form I-589, "Request for Asylum in the United States," on October 16, 1981. 2/ Upon receipt of an advisory

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1/ The filing of an application for asylum in exclusion proceedings shall also be considered as a request for withholding of exclusion or deportation under section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h). 8 C.F.R. 208.3(b); see Matter of Exilus, Interim Decision 2914 (BIA 1982); Matter of Portales, Interim Decision 2905 (BIA 1982); Matter of Castellon, 17 I&N Dec. 616 (BIA 1981).

2/ Although the applicant apparently filed an incomplete I-589 with the District Director, he states that he advised the District Director that a thorough I-589 would be submitted within 45 days. Because the District Director presumably denied the asylum application in a letter received by the applicant on November 30, 1981, the applicant submits that he was never given the opportunity to file a thorough I-589.

The applicant's contention is without merit. Although harmless, it was error for the District Director to rule on the I-589. Where an applicant for admission to the United States files an I-589 after being placed in exclusion proceedings, jurisdiction over his asylum claim lies exclusively with the

(Con't)

opinion from the United States Department of State, Bureau of Human Rights and Humanitarian Affairs (BHRHA), 3/ the exclusion hearing was resumed on December 9, 1981. The immigration judge found the applicant excludable as indicated above and denied his asylum application.

On appeal, the applicant submits that the Service has the burden of proving that exclusion proceedings are proper. He alleges it was error to deny his request to have the government's primary inspector verify that exclusion proceedings are appropriate. The applicant's argument is misplaced. It is clear that an applicant in exclusion proceedings has the burden of establishing that exclusion proceedings are improper. See section 291 of the Act; Matter of Phelisna, Interim Decision 2913 (BIA 1982); Matter of De La Nues, Interim Decision 2885 (BIA 1981); Matter of Pierre, 14 I&N Dec. 467 (BIA 1973); but cf. Matter of Salazar, 17 I&N Dec. 167 (BIA 1979) (colorable claim to lawful permanent resident status). The applicant has not alleged that he "entered" the United States, but, rather, testified that he intended to work in the United States, that he intended to live here permanently and that he had no document which would permit him to reside in this country. Thus, the record clearly establishes that the applicant is excludable under section 212(a)(20) of the Act as an immigrant without a valid immigrant visa or other valid entry document.

The applicant also raises various other arguments. He objects to the denial of his motion for "simultaneous translation" of the exclusion hearing. We find no error in the denial of this motion. See Matter of Exilus, Interim Decision 2914 (BIA 1982).

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immigration judge. See Matter of Dea, Interim Decision 2912 (BIA 1982). The applicant was placed in exclusion proceedings on September 1, 1981, with the service of Form I-122. His asylum application was subsequently filed on October 16, 1981. Therefore, as the District Director had no authority to rule on the original I-589, the applicant has no basis upon which to submit an amended I-589 to the District Director for adjudication.

3/ See 8 C.F.R. 208.7 and 208.10(b).

The applicant contests the denial of his motion for parole. We find no error in the denial of this motion. The District Director has exclusive jurisdiction to parole an alien into the United States pursuant to 8 C.F.R. 212.5(a). Neither the immigration judge nor this Board has jurisdiction to exercise parole power. Matter of Castellon, 17 I&N Dec. 616 (BIA 1981); Matter of Niayesh, 17 I&N Dec. 231 (BIA 1980); Matter of Lepofsky, 14 I&N Dec. 718 (BIA 1974); Matter of Conceiro, 14 I&N Dec. 278 (BIA), aff'd, Conceiro v. Marks, 360 F. Supp. 454 (S.D.N.Y. 1973).

The applicant argues that the denial of background information relating to conditions in Haiti deprived him of the opportunity to fully present his asylum claim. In Matter of Exame, Interim Decision 2920 (BIA 1982), we found that the applicant was not afforded a full and fair opportunity to present his persecution claim because the immigration judge categorically refused to admit background evidence pertaining to conditions in Haiti. These proceedings are distinguishable from Exame, however, in that the applicant's counsel admitted that he did not have the documents which he wished to present to the immigration judge for consideration. (T-20). Under the circumstances of these proceedings, we find no error in the immigration judge's refusal to receive unsubmitted documents. Moreover, some of the documents which the applicant sought to introduce were attached to his amended asylum application and were received into evidence.

In addition, we find no error in the immigration judge's refusal to admit the findings of fact in Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980). These findings were made in proceedings separate and distinct from those in the instant case. Further, it is not necessary to introduce federal decisions into the proceedings inasmuch as the findings and conclusions set forth therein are a matter of record and can be cited. Moreover, on appeal, the Fifth Circuit agreed in part with the government's contention that the district court erred in entering findings of fact on life in Haiti and found that the district judge exceeded his authority to the extent he implied by his findings and conclusions that the plaintiffs' claims of fear of persecution merited the granting of asylum. See Haitian Refugee Center v. Smith, 676 F.2d 1023, 1042 (5 Cir. 1982).

MATTER OF TANAHAN

In Section 245 Proceedings

A-23273236

Decided by Regional Commissioner November 13, 1981

(1) Adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, was not designed to supersede the regular consular visa-issuing processes or to be granted in nonmeritorious cases. Chen v. Foley, 385 F.2d 929 (6 Cir. 1967), cert. denied, 393 U.S. 838 (1968).

(2) The determination to grant permanent residence status under section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, lies entirely within the discretion of the Attorney General. An applicant who meets the objective prerequisites for adjustment of status is in no way entitled to that relief. Jarecha v. INS, 417 F.2d 220 (5 Cir. 1969).

ON BEHALF OF APPLICANT: Walter G. Vartanian, Esquire
79 Milk Street
Boston, Massachusetts 02109

This matter is before the Regional Commissioner on certification from the Acting District Director in Boston, Massachusetts. The Acting District Director denied the instant application as a matter of discretion upon determining that the applicant failed to meet the "inspected and admitted or paroled" provision of section 245(a) of the Immigration and Nationality Act, 8 U.S.C. 1255(a).

Section 245(a) of the Immigration and Nationality Act provides in part that:

> The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence . . . (Emphasis supplied).

The record relates to a 40-year-old married male alien, a native and citizen of Iran, who last arrived in the United States on June 5, 1979, by way of TWA flight number 753 from London, England. During the inspection process the applicant was referred by the primary immigration inspector at the port of entry to the secondary inspection area because the applicant was suspected of being an intending immigrant not in possession of a valid unexpired immigrant visa pursuant to section 212(a)(20) of the Act.

During the secondary inspection, it was ascertained that the applicant had been residing in England with his family and had resigned from the Oil Service Company of Iran of 1976. In addition, correspondence was discovered that indicated the applicant was actively seeking employment in the United States and had begun negotiations with an Atlanta employment agency. A letter was also found from the British Immigration office indicating that the applicant's request for the return of his passport had the effect of "cancelling the previous application for leave to remain" in the United Kingdom.

Given these facts the immigration inspector refused to admit the applicant to the United States and the applicant chose to execute a formal withdrawal of his application for admission instead of being detained for further inquiry by an immigration judge pursuant to section 235(b) of the Act.

Service Operations Instructions 235.1(o) sets forth the procedures to be followed in cases where an application for admission has been withdrawn and reads in part as follows:

> . . . In any case of an alien whose application for admission has been withdrawn or who has been ordered excluded and deported by a special inquiry officer and who is being turned over to the carrier which brought him to the United States for removal to the country

> from whence he came, the Form I-94 which that alien presented at the time of his application for admission shall be endorsed with the parole stamp and with the following notation thereon: (Show date to which paroled) To the (show name of carrier) for the purpose of removing (show name of alien) from the United States.
>
> The original of this form shall be given to the alien for presentation to the carrier for endorsement of departure data and return to the Service. At the same time, Form I-259 shall be appropriately endorsed and served on the carrier. The port of entry will retain the duplicate copy of Form I-94 only until the original with departure data is received and forwarded to the Central Office . . .

The record contains a copy of Form I-275 (Notice of Withdrawal of Application For Admission to the United States) which states in part:

> . . . I understand that my admissibility is questioned for the above reasons, which I have read or which have been read to me in the English language. Although I understand I may choose to appear before an immigration judge for a hearing in exclusion proceedings, I request that I be permitted to withdraw my application for admission and to return abroad . . .

This statement was signed by the alien on June 5, 1979, and the alien's signature was witnessed by a Supervisory Immigration Inspector.

The record also contains Form I-94 (Arrival-Departure Record) relating to the alien. Form I-94 indicates that the alien was paroled on June 5, 1979, for the purpose of being removed to London, England, on June 5, 1979, via Trans World Airlines. The record further indicates that an officer of the Immigration Service served Trans World Airlines Form I-259 (Notice to Detain, Deport, Remove or Present Aliens) on June 5, 1979, at 5 p.m. Form I-259 was signed for by an agent of Trans World Airlines and reads in part as follows:

> . . . to the owner, agent . . . of the Trans World Airlines. Pursuant to the provisions of the Immigration and Nationality Act, and the Regulations issued by the Attorney General thereunder, you are directed to . . . Remove to London on June 5, 1979, at 7:45 p.m. . . . Tanahan, Megerdich . . .

The applicant, however, did not depart the United States, but instead absconded from the port of entry. The next day, June 6, 1979, he appeared voluntarily with his attorney and was processed as an alien who had entered without inspection. 1/ On June 7, 1979, the United States Attorney declined prosecution under 8 U.S.C. 1325 for entry without inspection in favor of administrative proceedings. The applicant was then granted voluntary departure pursuant to the policy then in effect concerning Iranians.

On August 16, 1979, the applicant commenced the initial processing of an application for labor certification and this eventually resulted in his being the beneficiary of a sixth-preference visa petition approved on January 16, 1980. An Application for Status as Permanent Resident was filed on April 4, 1980, and the question of the applicant's eligibility for adjustment of status is now at issue.

Counsel's argument is succinct and simply states "parole is parole, whether to the airline for five hours or sixty days." In conclusion counsel states that there is no question that the applicant was paroled and therefore he is statutorily eligible for adjustment under section 245 of the Act.

1/ As a parolee, applicant for admission should not have been deemed to have made an entry without inspection under section 275 of the Immigration and Nationality Act, 8 U.S.C. 1325. The Board of Immigration Appeals held in Matter of Barragan-Garibay, 15 I&N Dec. 77 (BIA 1974), that where a paroled alien is erroneously prosecuted and convicted under section 275, the government will be collaterally estopped from denying that the applicant made an entry in subsequent administrative proceedings such as exclusion. This matter is distinguished from Barragan because this applicant was never convicted under section 275 and therefore the doctrine of collateral estoppel is not applicable.

The applicant alleges that he was denied effective assistance of counsel because his present counsel was not competent to handle this case, having no prior experience in immigration law. After reviewing the proceedings and the brief on appeal, we are unpersuaded that the applicant has sustained his burden of establishing that he was denied effective assistance of counsel.

Similarly, the applicant alleges that the immigration judge erred in refusing to grant a continuance because his counsel only had 9-days' notice to prepare for the hearing and because he had received the State Department's advisory opinion immediately before the hearing. This argument is without merit. The record reflects that counsel's partner was present and had represented the applicant at his original hearing on September 1, 1981. Further, the record contains Form G-28, "Notice of Entry of Appearance as Attorney or Representative," which was filed by the applicant's counsel and which was received into evidence by the immigration judge on September 29, 1981. Therefore, at a minimum, the applicant's counsel had over two months and, more likely, had over three months to prepare for this case. The 9-day notice in advance of the continued hearing held on December 9, 1981, was not insufficient notice inasmuch as the applicant's counsel actually had a substantially greater period of time in which to prepare for the proceedings.

In addition, we find no error with the denial of a continuance to rebut the State Department's advisory opinion. The applicant does not allege what evidence would have been forthcoming if the continuance had been granted. Further, the applicant was given the opportunity to rebut the opinion expressed by the State Department and, in fact, did so by testifying and submitting an amended asylum application in support of his position. Moreover, the opinion is not binding on the immigration judge or this Board.

Finally, the applicant asserts that he has established his asylum claim, based on his rationale for escaping from Haiti and belief of the consequences of his return to that country. The applicant also contends that there is no evidence to show why he is not entitled to asylum inasmuch as the Service did not call any witnesses or present any proof to rebut his case.

An applicant for asylum or withholding of deportation must show that, if deported, he would be subject to persecution or that he has a well-founded fear of persecution based on his race, religion, nationality, membership in a particular social group, or political opinion. Section 208(a) of the Act. See section 243(h) of the Act; Rejaie v. INS, ___ F.2d ___, Nos. 81-2375 and 82-3195 (3 Cir., filed Oct. 13, 1982); McMullen v. INS, 658 F.2d 1312 (9 Cir. 1981); Kashani v. INS, 547 F.2d 376 (7 Cir. 1977); Matter of Portales, Interim Decision 2905 (BIA 1982); Matter of Martinez-Romero, Interim Decision 2872 (BIA 1981); Matter of Dunar, 14 I&N Dec. 310 (BIA 1973). See also Stevic v. Sava, 678 F.2d 401 (2 Cir. 1982). It is clear that, when presenting a claim, the applicant has the burden of proof in such proceedings. See 8 C.F.R. 208.5; Haitian Refugee Center v. Smith, supra at 1042-43; McMullen v. INS, supra; Matter of Exilus, supra. Moreover, an alien who makes an illegal departure from Haiti does not necessarily establish a well-founded fear of persecution under the Act. See Matter of Exilus, supra. See also Matter of Nagy, 11 I&N Dec. 888 (BIA 1966); Matter of Liao, 11 I&N Dec. 113 (BIA 1965).

The applicant believes that his claim should be granted because of his problems with the Ton Ton Macoutes and because he departed from Haiti without authorization. In essence, the applicant states that his father was imprisoned by the Ton Ton Macoutes for an unknown reason, but was released upon the payment of $60.00. The applicant further states that because he was responsible for his father's release, he was questioned many times by the Ton Ton Macoutes. After a friend told him that the Ton Ton Macoutes were looking for him, the applicant decided to leave Haiti.

The applicant has not established that he will be persecuted or that he has a well-founded fear of persecution within the contemplation of section 208(a) or 243(h) of the Act, regardless of whether his claim is assessed in terms of whether he has demonstrated a "clear probability," a "good reason," or a "realistic likelihood." 4/ The applicant states that he departed from Haiti

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4/ Therefore, we find no error with the refusal of the immigration judge to submit the amended asylum application to the BHRHA of the Department of State for a second advisory opinion. See 8 C.F.R. 208.10(b).

without permission. However, if returned, he has not shown how his perceived treatment will be different from other Haitians who departed from that country without authorization or that the penalty, if any, imposed by the Haitian government is within the meaning of the Act. Further, on this record we are unable to conclude that the questioning and possible arrest of the applicant by the Ton Ton Macoutes qualifies the applicant for asylum and section 243(h) relief, particularly when the contents of the questioning and reason for the perceived arrest are not a matter of record.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

[illegible]
[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

1. [illegible]

The evidence of record clearly establishes that the alien was paroled into the United States pursuant to Service Operations Instructions 235.1(o). Therefore, the sole issue for our consideration is whether the alien's application for adjustment to that of a permanent resident under section 245 of the Act merits favorable exercise of the Attorney General's discretion.

The Act empowers the Attorney General or his designee (normally an officer of the Immigration and Naturalization Service) to determine if an applicant is entitled to the favorable exercise of the Attorney General's discretion. Statutes cannot be so detailed as to contain every regulation and form of procedure by which legislative policies set forth therein are carried out. Consequently, the courts have recognized that administrative officers must be permitted some discretion in the enforcement of laws.

Adjustment of status under section 245 of the Act was not designed to supersede the regular consular visa-issuing processes or to be granted in non-meritorious cases. Chen v. Foley, 385 F.2d 929 (6 Cir. 1967), cert. denied, 393 U.S. 838 (1968). An applicant who meets the objective prerequisites for adjustment of status is in no way entitled to that relief. Jarecha v. INS, 417 F.2d 220 (5 Cir. 1969). In the instant case, the alien has no close family ties or dependents living in the United States (the alien's spouse and his two children are citizens of Iran and have resided in London, England since November 1978). We also find that the alien's actions on June 5, 1979, clearly indicated that he intended to remain in the United States by superseding the regular consular visa-issuing process and by absconding from Trans World Airlines he hindered the Service in its effort to enforce the legislative policies set forth by Congress.

After carefully considering the entire record, together with counsel's representations on appeal, it is our considered opinion that the alien is not entitled to adjustment of status. Accordingly, the application is denied as a matter of discretion and the following order will be entered.

ORDER: Application denied.

★U.S. GOVERNMENT PRINTING OFFICE: 1982 - 381-[illegible]/1014

2929-2930

MATTER OF VALDOVINOS

In Deportation Proceedings

A-21630640

Decided by Board November 1, 1982

(1) Pre-sentence confinement is credited in determining the date of release from custody under section 2900.5 of the California Penal Code and such pre-sentence confinement is counted in determining whether a respondent is a person of good moral character under section 101(f)(7) of the Immigration and Nationality Act, 8 U.S.C. 1101(f)(7).

(2) Where a respondent's confinement for 59 days for his first conviction is added to his incarceration for 132 days in a California minimum security penal institution as a result of his second conviction, he is precluded from establishing good moral character, and thus is statutorily ineligible for voluntary departure under section 244(e) of the Act, 8 U.S.C. 1254(e).

(3) Deportation from the United States is not considered punishment or a criminal process and, therefore, the constitutional protection against double jeopardy which is applicable in criminal proceedings is not applicable in deportation proceedings.

CHARGE:
Order: Act of 1952 - Sec. 241(a)(2) [8 U.S.C. 1251(a)(2)] - Entry without inspection

ON BEHALF OF RESPONDENT:
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San Francisco Neighborhood Legal
Assistance Foundation
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San Francisco, California 94133

ON BEHALF OF SERVICE:
Ronald E. LeFevre
General Attorney

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

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I 21.11/2:

In a decision dated May 29, 1981, the immigration judge found the respondent deportable as charged and ordered him deported from the United States. The appeal will be dismissed.

The respondent is a native and citizen of Mexico, who admitted having last entered the United States in September of 1980 without inspection near San Ysidro, California (Tr. p. 3). Consequently, deportability under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), has been established by clear, convincing, and unequivocal evidence as required by Woodby v. INS, 385 U.S. 276 (1966), and 8 C.F.R. 242.14(a). The only issue on appeal is the immigration judge's denial of the respondent's application for voluntary departure in lieu of deportation pursuant to section 244(e) of the Act, 8 U.S.C. 1254(e).

Section 244(e) requires that an applicant for voluntary departure establish that he has been a person of good moral character for at least five years immediately preceding the voluntary departure application. The immigration judge concluded that the respondent was precluded from establishing the requisite five years of good moral character by section 101(f)(7) of the Act, 8 U.S.C. 1101(f)(7), which states:

> (f) For the purposes of this Act--No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was--
>
> (7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of 180 days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period. (Emphasis supplied).

It is undisputed that the respondent has two felony convictions for burglary in violation of section 459 of the California Penal Code, during the five year period immediately preceding the application for voluntary departure (Ex. 2, 3, 4). It is also undisputed that the second conviction on November 12, 1980, resulted in his being incarcerated for 132 days (Resp. brief p. 4-5). The respondent also admits that he was arrested on May 22, 1980, when he was charged with his first violation of section 459 of the California Penal Code (Resp. brief p. 4). On June 12, 1980, he was convicted and on July 1, 1980, he was sentenced to one year in the county jail with all but 90 days suspended (Ex. 2). He was given credit for time already served since his arrest and was released from custody on July 18, 1980 (Resp. brief p. 4). Thus, the time of incarceration easily exceeds 180 days. He spent 59 days incarcerated for the first offense and 132 days incarcerated for the second offense.

However, the respondent contends that the 41 days he spent incarcerated prior to his first conviction should not count in estimating the amount of time he spent incarcerated for purposes of the section 101(f)(7) preclusion of good moral character. He asserts that since a criminal defendant is presumed innocent until proven guilty, the time spent incarcerated prior to his conviction should not count as confinement "as a result of a conviction," under section 101(f)(7) of the Act (Brief p. 10).

We disagree with the respondent's contention. He was convicted pursuant to the California Penal Code. Section 2900.5(a) of the California Penal Code (Appendix A) specifies that a criminal defendant is given credit for pre-conviction confinement when determining the date of his release from custody. See People v. Helton, 91 Cal. Ap.3d 987, 154 Cal. Rptr. 482 (1979). Consequently, the time the respondent spent incarcerated prior to his July 1, 1980, conviction is considered time served as a result of his subsequent conviction under California law. In fact, pursuant to section 2900.5 the trial judge is prohibited from adjusting the sentence upward to cancel out the credit for pre-sentence confinement. In re Chamberlain, 78 Cal. Ap.3d 712, 144 Cal. Rptr. 326 (1978). Moreover, such pre-sentence confinement also results in the accruing of good behavior credit for early release from incarceration. See People v. McMillan, 110 Cal. Ap.3d 682, 167 Cal. Rptr. 924 (1980). The record further indicates that this respondent was given such credit for time served and good behavior/work time accumulated prior to his July 1, 1980, sentencing (Ex. 3). Therefore, we find without merit his contention that the time he spent incarcerated prior to his July 1, 1980, sentencing should not be counted in determining the time he was incarcerated as a result of his first conviction.

The respondent also contends that the time he spent incarcerated after his second conviction should not count as time incarcerated in a penal institution because he was placed in the Men's Correctional Facility at La Honda, California, which is a minimum security area with a work furlough facility. This contention is clearly without merit since such a prison facility is clearly a penal institution. We also note that section 2900.5 of the California Penal Code does not draw any such distinctions when it lists such work camps among the penal institutions covered by that section.

Finally, the respondent challenges the constitutionality of the section 101(f)(7) preclusion of good moral character on two constitutional grounds. First, he claims that its effect constitutes double jeopardy since it imposes double punishment for the same offenses. That argument has been consistently rejected by the courts. 1/ See Le Tourneur v. INS, 538 F.2d 1368 (9 Cir. 1976); Oliver v. United States Dept. of Justice, 517 F.2d 426 (2 Cir. 1975). Deportation from the United States has never been regarded as criminal punishment. Bugajewitz v. Adams, 228 U.S. 585 (1913); Mahler v. Eby, 264 U.S. 32 (1924). It is civil in nature and therefore the procedural safeguards prescribed for criminal cases are not applicable. Carlson v. Landon, 342 U.S. 524 (1952); Bilokumsky v. Tod, 263 U.S. 149 (1923); Chavez-Raya v. INS, 519 F.2d 397 (7 Cir. 1975).

Moreover, as the respondent concedes, claims as to the unconstitutionality of the statutes and regulations administered by this Board are outside the scope of our jurisdiction. See section 103 of the Act, 8 U.S.C. 1103; 8 C.F.R. 2.1; Matter of Bogart, 15 I&N Dec. 552 (BIA 1975, 1976; A.G. 1976); Matter of Chery and Hasan, 15 I&N Dec. 380 (BIA 1975); Matter of Santana, 13 I&N Dec. 362 (BIA 1969); Matter of L-, 4 I&N Dec. 556 (BIA 1951). Consequently, his last contention, that section 101(f)(7) is unconstitutionally overbroad, is outside of our jurisdiction to determine. The appeal will be dismissed.

1/ According to the respondent's position, all grounds of deportability for criminal aliens would entail double jeopardy since they would mete out double punishment for the same offenses. See sections 241(a)(4), (11), (14), (15), (16), (17) and (18), 8 U.S.C. 1251(a)(4), (11), (14), (15), (16), (17) and (18).

ORDER: The appeal is dismissed.

APPENDIX A

California Penal Code
§2900.5 (1981)

Credit for time in custody prior to commencement of sentence

(a) In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including but not limited to any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution, all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, and including days credited to the period of confinement pursuant to Section 4019, shall be credited upon his term of imprisonment, or credited to any fine which may be imposed, at the rate of not less than thirty dollars ($30) per day, or more, in the discretion of the court imposing the sentence. If the total number of days in custody exceeds the number of days of the term of imprisonment to be imposed, the entire term of imprisonment shall be deemed to have been served. In any case where the court has imposed both a prison or jail term of imprisonment and a fine, any days to be credited to the defendant shall first be applied to the term of imprisonment imposed, and thereafter such remaining days, if any, shall be applied to the fine.

(b) For the purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.

(c) For the purposes of this section, "term of imprisonment" includes any period of imprisonment imposed as a condition of probation or otherwise ordered by a court in imposing or suspending the imposition of any sentence, and also includes any term of imprisonment, including any period of imprisonment prior to release on parole and any period of imprisonment and parole, prior to discharge, whether established or fixed by statute, by any court, or by any duly authorized administrative agency.

(d) It shall be the duty of the court imposing the sentence to determine the date or dates of any admission to * * * and release from custody prior to sentencing, and the total number of days to be credited pursuant to the provisions of this section. The total number of days to be credited shall be contained in the abstract of judgment provided for in Section 1213.

(e) It shall be the duty of any agency to which a person is committed to apply the credit provided for in this section for the period between the date of sentencing and the date the person is delivered to such agency.

(Added by Stats.1971, c. 1732, p. 3686, § 2. Amended by Stats.1976, c. 1045, p. 4665, § 2; Stats.1978, c. 304, p. 632, § 1, urgency, eff. June 28, 1978; Stats.1980, c. 297, p. ____, § 1, urgency, eff. July 1, 1980.).

MATTER OF QUINTERO

In Deportation Proceedings

A-24229344

Decided by the Board November 16, 1982

(1) Deferred action status, granted pursuant to Operations Instructions 103.1(a)(1)(ii), is a matter of the District Director's prosecutorial discretion and, therefore, neither the immigration judge nor the Board may grant such status or review a decision of the District Director to deny it.

(2) Deferred action status may be requested at any stage in deportation proceedings and, therefore, it was not error for the immigration judge to refuse to adjourn the hearing for an alien to pursue that relief.

(3) The immigration judge's authority to grant voluntary departure does not confer on him the power to accord an alien extended voluntary departure since such authority in within the exclusive jurisdiction of the District Director.

CHARGE:
Order: Act of 1952 - Sec. 241(a)(1) [8 U.S.C. 1251(a)(1)] - Excludable at entry under section 212(a)(20), [8 U.S.C. 1182(a)(20)] - No valid immigrant visa

ON BEHALF OF RESPONDENT:
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ON BEHALF OF SERVICE:
Ronald E. Le Fevre
General Attorney

Gerald Hurwitz
Appellate Trial
Attorney

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

In a decision dated October 22, 1981, the immigration judge found the respondent deportable on his own admissions and granted him voluntary departure on or before April 1, 1982. The respondent has appealed from that decision. The appeal will be dismissed.

The respondent is a native and citizen of Mexico who last entered the United States on April 5, 1977. The record reflects that his wife is a lawful permanent resident whose visa petition has been approved to accord the respondent second-preference classification. They have two children, one of whom is a United States citizen.

At his deportation hearing the respondent made a motion to adjourn the proceedings in order to allow the District Director to act on his request for termination of the proceedings or for deferred action status pursuant to Operations Instruction 103.1(a)(1)(ii). 1/ He argued that the District Director should

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1/ Operations Instruction 103.1(a)(1)(ii) provides in pertinent part:

> The district director may, in his discretion, recommend consideration of deferred action, an act of administrative choice to give some cases lower priority and in no way an entitlement, in appropriate cases. (Revised)
>
> The deferred action category recognizes that the Service has limited enforcement resources and that every attempt should be made administratively to utilize these resources in a manner which will achieve the greatest impact under the immigration laws. . . .
>
> . . . .
>
> If the district director determines that a recommendation for deferred action should be made, it shall be made to the regional commissioner concerned on Form G-312, which shall be signed personally by the district director, and the basis for his recommendation shall be set forth therein specifically. . . .

have granted him permission to remain until a visa number was available because of the hardship his deportation would cause his family. He further contended that the immigration judge should grant him deferred action status or indefinite voluntary departure if the District Director declined to accord him relief. The immigration judge denied the respondent's motion to adjourn and found that he was without jurisdiction to grant deferred action status.

The respondent has reiterated his arguments on appeal and further contends that the immigration judge erred in refusing to adjourn the hearing so that the District Director could address his request for deferred action status. We find his contentions to be without merit.

As the Operations Instruction indicates, deferred action status is an informal administrative stay of deportation which is granted only where the District Director, with the Regional Commissioner's approval, finds it to be warranted. See Wan Chung Wen v. Ferro, 543 F. Supp. 1016 (W.D.N.Y. 1982). Such permission to remain in this country indefinitely is bestowed as a matter of prosecutorial grace and accords no rights to permanent residence. See Soon Bok Yoon v. INS, 538 F.2d 1211 (5 Cir. 1976); Zacharakis v. Howerton, 517 F.Supp. 1026 (S.D. Fla. 1981); Discaya v. INS, 339 F. Supp. 1034 (N.D. Ill. 1972); Matter of Lennon, 15 I&N Dec. 9 (BIA 1974), rev'd on other grounds, Lennon v. INS, 527 F.2d 187 (2 Cir. 1975); see also Manantan v. INS, 425 F.2d 693 (7 Cir. 1970); Matter of Merced, 14 I&N Dec. 644 (BIA 1974); Matter of Gallares, 14 I&N Dec. 250 (BIA 1972); but see Nicholas v. INS, 590 F.2d 802 (9 Cir. 1979); Petition of Guerrero-Morales, 512 F.Supp 1328 (D. Minn. 1981). 2/

Authority for a grant of deferred action status appears only in the Operations Instructions. It is mentioned nowhere in the statute or the regulations and is simply the result of an administrative policy to give low priority to the enforcement of the

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2/ The Operations Instruction was revised subsequent to the decisions in Nicholas v. INS and Petition of Guerrero-Morales, supra. See Wan Chung Wen v. Ferro, supra.

immigration laws in certain cases. 3/ See Zacharakis v. Howerton, supra. Consequently, the prosecutorial discretion exercised in granting deferred action status is committed exclusively to the Service enforcement officials. See Soon Bok Yoon v. INS, supra; Vergel v. INS, 536 F.2d 755 (8 Cir. 1976); Zacharakis v. Howerton, supra; Spata v. INS, 442 F.2d 1013 (2 Cir.), cert. denied, 404 U.S. 857 (1971); Discaya v. INS, supra. Inasmuch as deferred action status is a function of the District Director's prosecutorial authority, neither the immigration judge nor the Board may grant such status or review a decision of the District Director to deny it. See Lopez-Telles v. INS, 564 F.2d 1302 (9 Cir. 1977); Matter of Merced, supra; Matter of Gallares, supra; Matter of Geronimo, 13 I&N Dec. 680 (BIA 1971).

Furthermore, since the respondent can request deferred action status at any stage in the proceedings, the immigration judge did not err in refusing to adjourn the hearing to allow him to pursue that relief. See 1A C. Gordon and H. Rosenfield, Immigration Law and Procedure section 5.3e(7)(1982); Manantan v. INS, supra. Likewise, the immigration judge's refusal to continue the hearing until a visa number was available was proper because he may neither terminate nor indefinitely adjourn the proceedings in order to delay an alien's deportation. See Bowes v. INS, 443 F.2d 30 (9 Cir. 1971). Once deportation proceedings have been initiated by the District Director, the immigration judge may not review the wisdom of the District Director's action, but must execute his duty to determine whether the deportation charge is sustained by the requisite evidence in an expeditious manner. See Lopez-Telles v. INS, supra; Matter of Geronimo, supra. In any case, the fact that the respondent has an approved visa petition does not entitle him to delay the completion of deportation proceedings pending availability of a visa number. See Armstrong v. INS, 445 F.2d 1395 (9 Cir. 1971); Manantan v. INS, supra; Matter of Merced, supra; Matter of Agarwal, 13 I&N Dec. 171 (BIA 1969). We conclude therefore that the immigration judge did not abuse his discretion in denying the respondent's motion to adjourn.

3/ The factors considered in determining whether deferred action status should be granted are set forth in the Operations Instruction.

The respondent has argued that the immigration judge's authority to grant voluntary departure confers on him the power to accord extended voluntary departure, which he contends is equivalent to deferred action status. Unlike extended voluntary departure which allows an alien to remain in this country indefinitely, voluntary departure is only granted to aliens who have established that they are willing and have the immediate means to depart promptly from the United States. See 8 C.F.R. 244.1. As the respondent notes, the immigration judge is not limited as to the period of time he may grant for voluntary departure. See Hernandez-Rivera v. INS, 630 F.2d 1352 (9 Cir. 1980); Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977). However, it is well established that the immigration judge may not grant voluntary departure for an indefinite period of time. See Matter of Anaya, 14 I&N Dec. 488 (BIA 1973), aff'd sub nom. Anaya-Perchez v. INS, 500 F.2d 574 (5 Cir. 1974); Matter of Chamizo, 13 I&N Dec. 435 (BIA 1969). Furthermore, jurisdiction to grant extended voluntary departure, as well as deferred action status, lies solely with the District Director. See 8 C.F.R. 244.2; Manantan v. INS, supra, Matter of Anaya, supra. The respondent's argument is therefore without merit.

Finally, we conclude that the immigration judge did not abuse his discretion in declining to grant the respondent 2 years for voluntary departure as requested. The usual period of time allowed for voluntary departure is 30 days. See Matter of M-, 4 I&N Dec. 626 (BIA 1952). Taking into consideration the facts that the respondent has a lawful permanent resident wife and a United States citizen child and is the beneficiary of an approved visa petition, we find that the period of over 5 months granted by the immigration judge was more than adequate. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in Matter of Chouliaris, supra, the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of his failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

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MATTER OF DARYOUSH

In Bond Proceedings Pursuant to 8 C.F.R. 242.2(b)

A-23527148

Decided by the Board December 15, 1982

When an alien who has been released from custody applies to the District Director for amelioration of the conditions of bond pursuant to 8 C.F.R. 242.2(b), the District Director must state the reasons for his decision.

ON BEHALF OF RESPONDENT: Marilyn E. Park, Esquire
Atlanta Legal Aid Society, Inc.
Dekalb County Regional Office
231 West Ponce De Leon Avenue
Decatur, Georgia 30030

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

On September 24, 1982, the District Director denied the respondent's request for a reduction in the amount of bond imposed. The respondent has appealed from that decision. The record will be remanded to the District Director.

The record reflects that the respondent is a native and citizen of Iran who entered the United States as a nonimmigrant student on September 6, 1978. On May 7, 1981, he was charged with deportability for failure to comply with the conditions of his admission, and a bond in the amount of $2,500 was imposed. [1] Deportation proceedings have not yet been completed.

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[1] It appears from the record, however, that the respondent was released upon posting bond in the amount of $1,000 on May 8, 1981.

J 21. 11/2:

On August 25, 1982, the respondent requested a reduction in the amount of bond paid. The District Director responded in a letter on September 24, 1982, in which he determined that the bond should remain in effect at the same amount. The District Director stated that the respondent's request was denied because it did "not merit the favorable exercise of discretion. . ."

According to 8 C.F.R. 242.2(b), following the initial determination regarding custody made by the District Director, an application by an alien for release from custody or for amelioration of the conditions of release may be submitted to the immigration judge. However, if the alien has been released from custody, such application must be made to the immigration judge within 7 days. Thereafter, it may only be made to the District Director. *See* *Matter of Chew*, Interim Decision 2910 (BIA 1982); *Matter of Sio*, Interim Decision 2891 (BIA 1981); *Matter of Vea*, Interim Decision 2890 (BIA 1981). 2/

8 C.F.R. 242.2(b) further provides that when an immigration judge renders a decision in respect to custody, his determination must be entered on a Form I-342 and be accompanied by a memorandum as to the reasons for the determination. Although the regulation contains no such provision relative to a similar decision by the District Director, we find that it is also necessary for the District Director to state the reasons for his determination. A meaningful review of the decision by the Board is impossible unless the District Director indicates the basis for his conclusions. We therefore conclude that in rendering a determination on an application for amelioration of the conditions of bond pursuant to 8 C.F.R. 242.2(b), the District Director must state the reasons for his

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2/ When either the immigration judge or the District Director renders a decision on the application, the alien must be notified of his right to appeal the decision. Upon the filing of a notice of appeal, the District Director is required to immediately transmit to the Board all records and information pertaining to the determination from which the appeal has been taken. *See* 8 C.F.R. 242.2(b).

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ORDER: The record is remanded to the District Director for the entry of a new decision.

3/ We note in this regard that an alien generally should not be detained or required to post bond unless there is a finding that he is a threat to national security or a poor bail risk. See Matter of Patel, 15 I&N Dec. 666 (BIA 1976). A decision regarding the amount of bond to be imposed should be based on an objective evaluation of the factors presented. See Matter of Patel, supra; Matter of San Martin, 15 I&N Dec. 167 (BIA 1974); Matter of Moise, 11 I&N Dec. 102 (BIA 1967); Matter of S-Y-L-, 9 I&N Dec. 575 (BIA 1962). In determining whether or not the respondent's bond should be reduced, the District Director should therefore address himself to the pertinent facts and indicate how they warrant the amount of bond imposed.

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IN BOUND VOLUMES AS OF
JANUARY 15, 1983

This listing is composed of those precedent decisions produced by the Board of Immigration Appeals and the Immigration and Naturalization Service that have not been incorporated into the bound volumes of Administrative Decisions Under Immigration and Nationality Laws of the United States as of January 15, 1983. This listing presents the decisions in alphabetical and Interim Decision numbered sequence. Numbered Decisions in this listing are 2852 through 2931.

Volume 17 of Administrative Decisions Under Immigration and Nationality Laws of the United States is the most recent bound volume and contains decisions numbered 2711 through 2851.

This listing supersedes all previous listings.

EXPLANATION OF ABBREVIATION USED IN LISTING OF PRECEDENT DECISIONS

A.G.	Attorney General
Assoc. Commr.	Associate Commissioner
BIA	Board of Immigration Appeals
Comm.	Commissioner
D.D.	District Director
R.C.	Regional Commissioner

NOTE: Cite only the underscored name of the hyphenated names.

January 15, 1983

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Interim Decision #2931

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MATTER OF DARYOUSH

In Bond Proceedings Pursuant to 8 C.F.R. 242.2(b)

A-23527148

Decided by the Board December 15, 1982

When an alien who has been released from custody applies to the District Director for amelioration of the conditions of bond pursuant to 8 C.F.R. 242.2(b), the District Director must state the reasons for his decision.

ON BEHALF OF RESPONDENT: Marilyn E. Park, Esquire
Atlanta Legal Aid Society, Inc.
Dekalb County Regional Office
231 West Ponce De Leon Avenue
Decatur, Georgia 30030

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

On September 24, 1982, the District Director denied the respondent's request for a reduction in the amount of bond imposed. The respondent has appealed from that decision. The record will be remanded to the District Director.

The record reflects that the respondent is a native and citizen of Iran who entered the United States as a nonimmigrant student on September 6, 1978. On May 7, 1981, he was charged with deportability for failure to comply with the conditions of his admission, and a bond in the amount of $2,500 was imposed. 1/ Deportation proceedings have not yet been completed.

1/ It appears from the record, however, that the respondent was released upon posting bond in the amount of $1,000 on May 8, 1981.

On August 25, 1982, the respondent requested a reduction in the amount of bond paid. The District Director responded in a letter on September 24, 1982, in which he determined that the bond should remain in effect at the same amount. The District Director stated that the respondent's request was denied because it did "not merit the favorable exercise of discretion. . ."

According to 8 C.F.R. 242.2(b), following the initial determination regarding custody made by the District Director, an application by an alien for release from custody or for amelioration of the conditions of release may be submitted to the immigration judge. However, if the alien has been released from custody, such application must be made to the immigration judge within 7 days. Thereafter, it may only be made to the District Director. See Matter of Chew, Interim Decision 2910 (BIA 1982); Matter of Sio, Interim Decision 2891 (BIA 1981); Matter of Vea, Interim Decision 2890 (BIA 1981). [2]

8 C.F.R. 242.2(b) further provides that when an immigration judge renders a decision in respect to custody, his determination must be entered on a Form I-342 and be accompanied by a memorandum as to the reasons for the determination. Although the regulation contains no such provision relative to a similar decision by the District Director, we find that it is also necessary for the District Director to state the reasons for his determination. A meaningful review of the decision by the Board is impossible unless the District Director indicates the basis for his conclusions. We therefore conclude that in rendering a determination on an application for amelioration of the conditions of bond pursuant to 8 C.F.R. 242.2(b), the District Director must state the reasons for his

---

[2] When either the immigration judge or the District Director renders a decision on the application, the alien must be notified of his right to appeal the decision. Upon the filing of a notice of appeal, the District Director is required to immediately transmit to the Board all records and information pertaining to the determination from which the appeal has been taken. See 8 C.F.R. 242.2(b).

decision. Inasmuch as the District Director failed to explain the rationale for his determination in this case, the record will be remanded for the entry of a new decision. 3/

ORDER: The record is remanded to the District Director for the entry of a new decision.

3/ We note in this regard that an alien generally should not be detained or required to post bond unless there is a finding that he is a threat to national security or a poor bail risk. See Matter of Patel, 15 I&N Dec. 666 (BIA 1976). A decision regarding the amount of bond to be imposed should be based on an objective evaluation of the factors presented. See Matter of Patel, supra; Matter of San Martin, 15 I&N Dec. 167 (BIA 1974); Matter of Moise, 11 I&N Dec. 102 (BIA 1967); Matter of S-Y-L-, 9 I&N Dec. 575 (BIA 1962). In determining whether or not the respondent's bond should be reduced, the District Director should therefore address himself to the pertinent facts and indicate how they warrant the amount of bond imposed.

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Volume 15 contains a cumulative index for Volumes 1-15. Volume 17 which was published in July 1982 contains a cumulative index for Volumes 16 and 17.

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Assoc. Commr.	Associate Commissioner
BIA	Board of Immigration Appeals
Comm.	Commissioner
D.D.	District Director
R.C.	Regional Commissioner

NOTE: Cite only the underscored name of the hyphenated names.

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MATTER OF ISOVIC

In Visa Petition Proceedings

LOS-N-45355

Decided by Commissioner June 6, 1982

(1) A petitioner seeking to classify an alien under section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L), must demonstrate the intention to employ the beneficiary in the United States for only a temporary period.

(2) While a petitioner for an L classification generally need submit only a simple statement of the facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily, where the beneficiary is the owner/major stockholder of the petitioning company, a greater degree of proof is required.

ON BEHALF OF PETITIONER: Robert L. Miller, Esquire
Miller and Miller
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Los Angeles, California 90057

This matter is before the Commissioner upon certification in accordance with 8 C.F.R. 103.4. The petition was denied by the District Director. An appeal to the Regional Commissioner was dismissed on November 25, 1981.

The petitioner, Bis-Shaefer Corporation, seeks to classify the beneficiary, Midhat Isovic, as an intra-company transferee. The petitioner is incorporated in the state of California to conduct a heavy construction business and the import and export of electronic apparatus. A 51% share of the petitioning corporation

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is owned by the beneficiary. The beneficiary's presence in the United States is sought to manage and direct the corporation's activities in the United States. Evidence has been submitted that the beneficiary was employed abroad for more than one year by the Shaefer Company Ltd., of Munich, Germany, and by the BIS Company, also of Munich, Germany. Evidence demonstrates that the overseas companies are affiliated with the petitioner inasmuch as they are under the common ownership and control of the beneficiary and that the beneficiary was substantially involved in management and executive duties for the overseas companies for the requisite one year or more. Both overseas "affiliates" are incorporated in Germany.

In Matter of Tessel, Inc., 17 I&N Dec. 631 (A.C. 1981), the Service determined that a corporation and its stockholders are separate legal entities and that a corporation can employ and petition for a stockholder.

The Regional Commissioner concedes that the petitioner has established the foregoing facts, but in his decision of December 8, 1981, found that the petitioner had failed to establish that the beneficiary was coming to the United States temporarily and, therefore, the beneficiary was not entitled to classification as an intra-company transferee. The petitioner argues that section 101(a)(15)(L) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1101(a)(15)(L), does not require the petitioner to establish that a beneficiary is coming temporarily, and that the temporariness of a beneficiary's stay is an issue which may be considered only in conjunction with an application for visa issuance before a United States consular officer. The petitioner, through counsel, also argues that the Regional Commissioner has inappropriately imposed the requirement that the services required of the beneficiary be of a temporary nature. The petitioner correctly comments that the temporariness of an occupational position is a statutory requisite for classifying a temporary worker under section 101(a)(15)(H)(ii) of the Act.

Section 101(a)(15)(L) of the Act provides for the classification and admission of an intra-company transferee as follows:

> (L) an alien who, immediately preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

Title 8, Code of Federal Regulations 214.2(1)(1) provides that, "A petition approved under this paragraph is valid for the period of established need for the beneficiary's temporary services but not to exceed three years." Service Operations Instruction 214.2(1) provides that, "A petitioner for an L-1 nonimmigrant must establish that he is seeking such classification for the beneficiary to enable the latter to enter temporarily to perform specified services."

The same Operations Instruction provides that the beneficiary's intent with regard to the temporariness of his proposed stay in the United States is pertinent primarily to the beneficiary's eligibility for issuance of an L-1 visa and his admission to the United States as a nonimmigrant.

In the foregoing discussion and references, the concept of "temporariness" has two separate applications: the intent of the alien beneficiary to enter temporarily, and the intent of the employer to use the beneficiary's services temporarily. The Service has long held that the intent of the beneficiary is not relevant in a nonimmigrant visa petition proceeding. Matter of University of Oklahoma, 14 I&N Dec. 213 (R.C. 1972). In this context, temporariness relates to the alien's eligibility for classification as a nonimmigrant and is to be considered in the visa issuance process or at the time of his application for admission to the United States. The intention of the petitioning employer to use a beneficiary temporarily or permanently, however, does relate to the nonimmigrant visa petition process for temporary workers under either the "H" or "L" nonimmigrant categories. Sections 101(a)(15)(H) and (L) clearly state that the beneficiary must be coming temporarily. Matter of Lee, Interim Decision 2876 (R.C. 1981).

In this proceeding, the Regional Commissioner saw these two separate applications of "temporary" but did not clearly express them. His use of the phrases "temporary nature of services" and "services needed only on a temporary basis" are not correct in this context. The requirement that a job or occupation be of a temporary nature relates to the statutory requirement for the "H-2" temporary nonimmigrant worker section 101(a)(15)(H)(ii) and not to sections 101(a)(15)(H)(i) or (L). The Regional Commissioner also improperly cited Hess v. Esperdy, 234 F. Supp. 909 (S.D.N.Y. 1964). That decision again relates to the "H-2" temporary worker classification and not to the intra-company transferee (L-1). The issues which must be satisfied in the present proceeding are not the intent of the beneficiary nor whether the occupational position requires services of a temporary nature. The issue is whether or not the petitioner will employ the beneficiary for a limited period of time. It is irrelevant to the "L-1" classification whether the occupation is temporary or permanent, so long as the alien beneficiary will only be utilized for a temporary period.

The Regional Commissioner has raised a valid question in the instance of a corporate enterprise which is essentially owned by the alien beneficiary who is engaged as the principal manager or executive: Does the petitioner and corporate entity intend to employ the beneficiary permanently in the position for which it is petitioning? I do not agree with the Regional Commissioner that this question must be answered in the affirmative to the effect that the permanent presence and employment of a principal stockholder and beneficiary is automatically indicated in all cases. Nonetheless, the question must be asked and the petitioner must be given an opportunity to establish whether it is the petitioner's intention to employ the beneficiary for only a temporary period in the United States. Although the intentions of the alien beneficiary and of the company's stockholder appear to merge in this situation, the legal fiction of corporate identity separate from the stockholders must be maintained.

The petitioner, through counsel, was requested to furnish evidence and information concerning whether or not the beneficiary will be employed temporarily. The specific information sought included the following:

> (1) a description of the petitioner's/beneficiary's other business activities and/or investments, if any; (2) the petitioner's statement concerning how long the beneficiary's services will be required in the United States; (3) what provisions, if any, have been made to operate the business when the beneficiary returns abroad; and (4) whether or not the Bis-Shaefer Corporation plans to permanently or indefinitely operate in the United States.

The petitioner's reply, through counsel, reaffirmed that the petitioner intended to employ the beneficiary temporarily but provided few specifics. No information is available here as to whether or not the overseas affiliates will continue in operation and whether or not these activities will cause the beneficiary to travel abroad. Counsel states that, "It is impossible to have any provisions to operate the business when the beneficiary returns abroad." Counsel also states that if the company is successful, "it will operate indefinitely."

Because of the indefinite character of the business which requires careful corporate planning of long-term contingencies, the fact that the operation and, indeed, the very existence of the business depends upon the presence of the owner/operator/stockholder, and the fact that no evidence or information has been offered to show that the employment will be of limited duration, I must conclude that the petitioner has failed to establish that it is seeking L-1 nonimmigrant classification to enable the beneficiary to enter the United States temporarily to perform the specified services.

This finding, however, should not be construed as prohibiting a corporation owned wholly or primarily by one individual from bringing to the United States the owner/operator under the "L-1" visa classification. This can be accomplished if the petitioner demonstrates its intention to employ the beneficiary temporarily and can show that the temporary services of the owner/operator will no longer be utilized at some future date. It can be further evidenced by demonstrating that the operating company will exist only for a finite period in the United States or that the owner's/operator's investments and enterprises abroad are such that in all likelihood he will not be employed and present in the United States for indefinite periods of time, but will return to manage the other investments.

While the Service has generally accepted that the burden of proving the temporary utilization of a beneficiary's services is met through a simple statement of the facts and listing of dates, the circumstances involved in a petition for an owner/operator require a greater degree of proof beyond a mere on-record statement. The form of this proof is the responsibility of the petitioner. However, it is suggested that evidence establishing a record of corporate transfers, relocation of high-level personnel, or anticipated future events which will affect the reassignment of the owner/operator outside of the United States, will normally meet the petitioner's burden of proof.

ORDER: The petition is denied.

MATTER OF ARTEE CORPORATION

In Visa Petition Proceedings

LOS-N-46504

Decided by Commissioner November 24, 1982

(1) In determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" as required by section 101(a)(15)(H)(ii) of the Act, 8 U.S.C. 1101(a)(15)(H)(ii), the test is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling.

(2) Matter of Contopoulos, 10 I&N Dec. 654 (R.C. 1964), overruled.

(3) Because the business of a temporary help service is to meet the temporary needs of many clients, the nature of the petitioner's needs for the beneficiary is more or less continuous. Where as here there is a current shortage of the particular skill, the petitioner's need to supply this employee to its clients is ongoing, not temporary as required by section 101(a)(15)(H)(ii).

ON BEHALF OF APPLICANT: John A. Joannes, Esquire
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Los Angeles, California 90010

This case is before the Commissioner on certification of the Regional Commissioner's decision of June 2, 1982.

The petitioner is seeking to classify the beneficiaries under section 101(a)(15)(H)(ii) of the Act, 8 U.S.C. 1101(a)(15)(H)(ii), as machinists. The petitioner provides temporary help to technically-oriented firms.

The sole issue in this case is the temporary need of the petitioner for the services of the beneficiary. In a situation involving a "temporary help" service, the Service has found that such a service is qualified to be and remains the actual employer of the beneficiary. *See Matter of Smith*, 12 I&N Dec. 772 (D.D. 1968). The petitioner in this case is a temporary help service and I agree with the Regional Commissioner that it qualifies as a petitioner and is the actual employer of the beneficiaries. The Regional Commissioner found that, because of the current wide-spread shortage of machinists in the United States, the nature of the employment offered must be viewed as permanent and not temporary. The decision examined the use of the beneficiaries' services by the customer of the help service in reaching this conclusion. I do not believe that this is the proper view of the employment situation involved. The test of the true nature of the temporary need for the position lies in examination of the temporary need of the temporary help service, not its customers.

Section 101(a)(15)(H)(ii) defines an H-2 temporary worker as an alien "who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such services or labor cannot be found in this country. . ." As noted in *Matter of Contopoulos*, 10 I&N Dec. 654, 657 (Acting R.C. 1964)," . . .*both* the coming to the United States and the performance of service or labor must be *temporary*, the term 'temporary' being used twice." The nature of the duties to be performed were controlling, not the intent of the petitioner and the beneficiary concerning the time that the individual beneficiary would be employed in that position.

The Service now views this interpretation as incorrect. It is not the nature or the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position. Under this interpretation the key question in *Contopoulos* is: "Can the petitioner credibly establish that she has not employed a mother's helper in the past and that her need for a mother's helper will end in the near, definable future?" Likewise, in the instant case, the primary question becomes: "Can Artee establish that they have not employed machinists in the past and will not need the services of machinists in the near, definable future?" Here, as in *Contopoulos*, we are considering the second temporary requirement of the statute which concerns the position itself and not the first requirement which relates to the intent of the alien to enter for a temporary period. The function of a temporary help service is to provide for the fluctuating needs of other enterprises for specified services. In this case the petitioner provides technically-oriented personnel of a skilled nature to industries requiring such services. The customers of the petitioner do not have a steady need for a specific number of employees. Their business fluctuates and in so changing, their personnel needs change. To meet their needs, the customers of the petitioner turn to the petitioner to provide temporary help. While it is true that the temporary help may be needed for periods of 2 to 3 years, it is also true that shorter periods can be involved and that the need of the customer may not continue.

The situation of a temporary help service differs, however. The business of a temporary help service is to meet the temporary needs of its clients. To do this they must have a *permanent* cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand. By the very nature of this arrangement, it is obvious that a temporary help service will maintain on its payroll, more or less continuously, the types of skilled employee most in demand. This does not mean that a temporary help service can never offer employment of a temporary nature. If there is no demand for a particular type of skill, the temporary help service does not have a continuing and permanent need. Thus a temporary help service may be able to demonstrate that in addition to its regularly employed workers and permanent staff needs it also hires workers for temporary positions. For a temporary help service company, temporary positions would include positions requiring skill for which the company has a non-recurring demand or infrequent demand.

There is currently a wide-spread shortage of skilled machinists in the United States. Because of this shortage, the petitioner, as a prudent business measure, has ensured that it can supply machinists to its customers. Its need to supply machinists to its customers is ongoing. Therefore, as long as this universal shortage of machinists exists, the nature of the need for the position with the petitioner is such that the duties are not temporary and will persist as long as the shortage.

In the absence of evidence that the petitioner has a nonrecurring or infrequent demand for skilled machinists, the following order is entered:

ORDER: The petition is denied.

MATTER OF CLARKE

In Visa Petition Proceedings

A24313889
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A24553333

Decided by Board February 15, 1983

(1) In order to obtain a preference status for the beneficiaries as his sons and daughter under section 203(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1153(a)(1), a petitioner must establish that the beneficiaries once qualified as his "children" within the meaning of section 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1).

(2) Under the law of New Jersey, the father's residence and domicile, legitimation of a child born out-of-wedlock requires the marriage of the child's natural parents. New Jersey Statutes Annotated, Section 9:15-1, 9:15-2.

(3) By virtue of the Barbados Status of Children Reform Act of August 13, 1979, children born in or out-of-wedlock (before or after the effective date of the Act) have equal status under the laws of that country.

(4) A child who comes within the scope of the Barbados Status of Children Reform Act of 1979 is included within the definition of a legitimate or legitimated "child" as set forth in section 101(b)(1) of the Act if paternity is established and the person is under 21 years of age and the legitimation took place before the child reached the age of 18 years.

1/ We note that the record file before the Board reflects that two of the beneficiaries share the same "A" number.

(5) Visa petitions for beneficiaries born out-of-wedlock in Barbados were properly denied for failure to satisfy the requirements of section 101(b)(1) of the Act where the beneficiaries were 22, 21, and 18 years old when the Barbados Status of Children Reform Act was enacted.

ON BEHALF OF PETITIONER:
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ON BEHALF OF SERVICE:
William W. Kummings
Acting Appellate
Trial Attorney

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

The United States citizen petitioner applied for preference status for the beneficiaries as his unmarried sons and daughter pursuant to section 203(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1153(a)(1). In a decision dated January 8, 1982, and July 20, 1982, the District Director and an Acting District Director denied the petitions on the ground that the petitioner never married the beneficiaries' natural mother and thus did not qualify them as his legitimate or legitimated children within the meaning of section 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1). The petitioner has appealed and oral argument was heard on October 18, 1982. The appeal will be dismissed.

The petitioner is a 47-year-old native of Barbados who was naturalized as a United States citizen on March 24, 1980. He resides in Newark, New Jersey. The beneficiaries were born out-of-wedlock in Barbados on May 4, 1957, September 29, 1958, and April 27, 1960, respectively, to the petitioner and a woman he never married. The instant visa petitions were filed in July 1982.

In support of the visa petitions, the petitioner has submitted three Barbadian Deed Polls and six affidavits from the petitioner's brother and the beneficiaries' natural mother's sister.

The Deed Polls show that the beneficiaries "RENOUNCE AND ABANDON" the use of their natural mother's surname and "ASSUME" the petitioner's surname in August of 1980. The affidavits allege that the beneficiaries' natural father is the petitioner.

The District Director determined that since the beneficiaries' natural parents never married, they could not qualify as the petitioner's legitimate or legitimated children within the meaning of section 101(b)(1) of the Act, 2/ and, therefore, denied the petitions.

On appeal, the petitioner, through counsel, indicates that he is the natural father of the beneficiaries; that they were born out-of-wedlock; and that he "has recognized his parental responsibility towards his three children, and has at all times acknowledged his paternity of each child." Petitioner further states in his brief dated October 8, 1982, that all legal distinctions between Barbadian children, whether born in or out-of-wedlock, have been abolished, and that the law is retroactive in effect. In support of that statement, the petitioner submitted a document which purports to be a copy of the text of the Barbadian Status of Children Reform Act, 1979 -32. Petitioner's enclosure is made a part of the record of these proceedings.

The Acting Appellate Trial Attorney for the Immigration and Naturalization Service agrees that the law presented by petitioner's counsel is the relevant law and is retroactive.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefits sought. Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966). To obtain preference

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2/ Both the January 8, 1982, and the July 20, 1982, decisions of the Immigration and Naturalization Service state that section 101(b)(1)(C) of the Act defines a child as a legitimate or legitimated child. We note that section 101(b)(1)(A) of the Act specifically refers to legitimate children while section 101(b)(1)(C) refers exclusively to legitimated children.

status for the beneficiaries as his sons and daughter under section 203(a)(1) of the Act, the petitioner must establish that the beneficiaries once qualified as his children as that term is defined by section 101(b)(1) of the Act. Matter of Coker, 14 I&N Dec. 521 (BIA 1974).

> The term "child" means an unmarried person under twenty-one years of age who is—
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> (A) a legitimate child; or
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> . . . .
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> (C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation. [Emphasis added.]

In the present case, the beneficiaries were born out-of-wedlock. Accordingly, it must be established that they are either deemed legitimate or legitimated under the law of Barbados or New Jersey.

Under the law of New Jersey, the legitimation of a child born out-of-wedlock requires the marriage of the child's natural parents. New Jersey Statutes Annotated, Sections 9:15-1, 9:15-2. Here, the beneficiaries' natural parents never married.

We have held that when the country where a beneficiary was born and resides eliminates all legal distinctions between legitimate and illegitimate children, all natural children are deemed to be the legitimate or legitimated offspring of their natural father from the time that country's laws are changed. See Lau v. Kiley, 563 F.2d 543 (2 Cir. 1977); Matter of Sanchez, 16 I&N Dec. 671 (BIA 1979); Matter of Wong, 16 I&N Dec. 646 (BIA 1978). The test we have applied for preference immigration purposes is equality of filial rights when compared with those children born in wedlock. Compare Matter of Sanchez, supra, with Matter of Clahar, Interim Decision 2852 (BIA 1981); Matter of Reyes, 16 I&N Dec. 475 (BIA 1978).

In light of the petitioner's and Service's statements on appeal, we have examined the laws of Barbados in order to ascertain the current legal status of children born in or out-of-wedlock in that country and to determine how these laws may effect the visa petitions under consideration in this case.

We note that on August 13, 1979, the Status of Children Reform Act, 1979 -32, was enacted in Barbados. The expressed intention of this legislation is to remove the legal disabilities of children born out-of-wedlock. It is clear from studying the text of Part II 3/ of the Status of Children Reform Act that the drafters intended to establish equal status under the laws of Barbados for children born in or out-of-wedlock. Additionally, we agree with

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3/ Part II of the Status of Children Reform Act, 1979 -32, of Barbados provides that:

> Equal Status of Children
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> 3. For the purposes of the laws of Barbados the distinction at common law between the status of children born within or outside of marriage is abolished, and all children shall, after the commencement of this Act, be of equal status; and a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside of marriage. [Emphasis added.]
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> 4. The parent and child relationship as determined in accordance with section 3 shall for all purposes be followed in the determination of other kindred relationships flowing therefrom.

(cont'd)

petitioner's counsel and the Service's interpretation of subsection (6) of Part II of the Status of Children Reform Act to be retroactive in effect for children born before the effective date of the Status of Children Reform Act.

In the case before us, the alleged "legitimation" of the beneficiaries took place when they were over 18 years old. It appears, therefore, that the legitimation occurred too late to confer any immigration benefits. However, the petitioner argues, on appeal, that legitimation is retroactive in effect and makes the legitimated persons legitimate from birth. This argument is fallacious. Generally, when a child is legitimated, the child is deemed legitimate from the time of its birth. This has nothing to do with the age of the child at the time when the act of legitimation takes place. In this case, the act of legitimation took place when the beneficiaries were 22, 21, and 18, not when they were born. The petitioner's argument thus has no merit. Matter of Obando, 16 I&N Dec. 278 (BIA 1977); Matter of Cortez, 16 I&N Dec. 289 (BIA 1977); and Matter of Clahar, supra.

The petitioner seeks to support his argument by citing our decisions in Matter of Sanchez, supra; Matter of Wong, supra; Matter of Hernandez, 17 I&N Dec. 7 (BIA 1979); and Matter of Pavlovic, 17 I&N Dec. 407 (BIA 1980). In these cases, we held that when the country where the beneficiaries were born and reside eliminates

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> 5. Unless a contrary intention appears any reference in an enactment or instrument to a person or class of persons described in terms of relationships by blood or marriage to another person shall be construed to refer to or include a person who comes within the description by reason of the relationship of parent and child as determined in accordance with sections 3 and 4.
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> 6. This Act applies to all children whether born before or after the commencement of this Act and to all dispositions and instruments made after such commencement. [Emphasis added.]

all legal distinctions between legitimate and illegitimate children, all natural children are deemed to be the legitimate offspring of their natural father from the time that country's laws are changed. The dispositive factor was that the acts eliminating all legal distinctions between legitimate and illegitimate children had occurred before the beneficiaries had reached the age of 18 years. See Matter of Obando, supra. In the present case, the beneficiaries were over 18 years old when the Barbados Status of Children Reform Act was enacted. Petitioner's reliance upon these cases, therefore, is misplaced. Accordingly, they did not qualify as the "children" of their natural father within the meaning of section 101(b)(1). Therefore, the petitioner has not carried his burden of qualifying the beneficiaries for preference status as his unmarried sons and daughter under section 203(a)(1) of the Act even if it is assumed that paternity of the beneficiaries by the petitioner was adequately proven.

We conclude, therefore, that the decisions of the District Director and Acting District Director are correct. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

MATTER OF FORSTNER

In Deportation Proceedings

A-30461480

Decided by the Board February 24, 1983

Expungement of a narcotics conviction pursuant to section 137.225 of the Oregon Revised Statutes does not eliminate the conviction for purposes of deportation because that statute is not a state counterpart to the federal first offender statute, 21 U.S.C. 844(b)(1).

CHARGE:
Order: Act of 1952 - Sec. 241(a)(11) [8 U.S.C. 1251(a)(11)] - Convicted of a narcotics violation

ON BEHALF OF RESPONDENT:
Gerald H. Robinson, Esquire
1001 S. W. Fifth Avenue, Suite 1500
Portland, Oregon 97204

ON BEHALF OF SERVICE:
Kendall B. Warren
General Attorney

BY: Milhollan, Chairman; Maniatis, Dunne, and Vacca, Board Members

The respondent has appealed from a decision of the immigration judge dated November 9, 1979, denying his request to terminate deportation proceedings and ordering him deported from the United States. The appeal will be dismissed.

In a decision dated November 2, 1976, the immigration judge found the respondent deportable under section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C 1251(a)(11), by virtue of his conviction in the Circuit Court of the State of Oregon for Lane

County on December 1, 1975, of illegal furnishing of narcotics in violation of section 167.207 of the Oregon Revised Statutes. The respondent's appeal from that decision was dismissed by an order of the Board on August 9, 1977, which was affirmed on petition for review. Forstner v. INS, 579 F.2d 506 (9 Cir. 1978). The respondent's petition for writ of certiorari was also denied. INS v. Forstner, 99 S.Ct. 841 (1979).

On February 28, 1979, the respondent filed a motion to reopen which was granted by the Board on March 26, 1979. At a reopened hearing, the respondent argued that deportation proceedings should be terminated because the conviction on which his deportation order was based had been expunged pursuant to section 137.225 of the Oregon Revised Statutes. 1/ Having reviewed the statute involved,

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1/ Section 137.225 provides in pertinent part:

> (1) At any time after the lapse of three years from the date of pronouncement of judgment, any defendant who has fully complied with and performed the sentence of the court and whose conviction is described in subsection (5) of this section by motion may apply to the court wherein that conviction was entered for entry of an order setting aside the conviction.
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> . . .
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> (3). . . Upon the entry of such an order, the applicant for purposes of the law shall be deemed not to have been previously convicted and the court shall issue an order sealing the record of conviction and other official records in the case, including the records of arrest resulting in the criminal proceeding.
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> . . .
>
> (5) The provisions of subsection (1) of this section apply to a conviction of:

(Con't)

the immigration judge concluded that it was not a counterpart to the federal first offender statute, 21 U.S.C. 844(b)(1), because its application was not limited to convictions of first offenders. He further noted that a conviction expunged under the Oregon

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(a) A Class C felony.

(b) The crime of possession of the narcotic drug marijuana when that crime was punishable as a felony only.

(c) A crime punishable as either a felony or a misdemeanor, in the discretion of the court.

(d) A misdemeanor, including a violation of a municipal ordinance, for which a jail sentence may be imposed.

(e) A violation described in ORS 167.207, 167.217 or 167.222.

. . .

(6) The provisions of subsection (1) of this section do not apply to:

. . .

(b) A person convicted, within the 10-year period immediately preceding the filing of his motion pursuant to subsection (1) of this section, of more than one offense, excluding motor vehicle violations, whether the second or additional convictions occurred in the same action in which the conviction as to which relief is sought occurred or in another action. Notwithstanding subsection (1) of this section, a conviction which has been set aside under this section shall be considered for the purpose of determining whether this paragraph is applicable. . .

statute could subsequently be considered for purposes of determining eligibility for other expungements, as well as in certain instances in civil proceedings. Thus he found that the respondent's conviction was not eliminated for purposes of deportation.

In a well-reasoned brief on appeal, the respondent argues that the Oregon statute should be considered a first offender statute and that consequently his expunged conviction should no longer provide a basis for deportation. Citing the criteria set forth in Matter of Kaneda, 16 I&N Dec. 677 (BIA 1979), he contends that the Oregon statute is a counterpart to the federal statute because its purpose is to give a first offender a second opportunity by eliminating the effects of a conviction and because its benefits are limited to a small class of individuals consisting of those convicted of committing only minor offenses who have not been otherwise convicted in the previous 10 years. He further claims that he would have been eligible for relief as a first offender if convicted in a federal court and therefore should be treated in an equal manner to others convicted in federal courts or in state courts which have counterpart first offender statutes.

We are unable to agree with the respondent's assertion that the Oregon expungement statute is a counterpart to the federal first offender statute. Its language, unlike that of other statutes recognized as being equivalent to the federal statute, does not parallel the provisions of 21 U.S.C. 844(b)(1). See Matter of Seda, 17 I&N Dec. 550 (BIA 1980); Matter of Kaneda, supra; Matter of Haddad, 16 I&N Dec. 253 (BIA 1977); Matter of Werk, 16 I&N Dec. 234 (BIA 1977). In Matter of Seda, supra, we noted that the federal first offender statute and each of its state counterparts provided for withholding of adjudication of guilt by the court and discharge without a conviction upon successful completion of probation. Cf. Matter of Zangwill, Interim Decision 2858 (BIA 1981). We found the first offender statutes to be distinguishable in this respect from procedures for expunging an existing conviction.

In order to be eligible for relief under the Oregon statute, an offender's sentence must have been completed and 3 years must have elapsed since pronouncement of judgment before a conviction may be set aside. This procedure clearly differs from that set forth in the first offender statutes where no conviction exists. Since section 137.225 merely eliminates the stigma of a conviction after fulfillment of the penalties imposed, it is akin to an expungement statute which we have long held will not eliminate a conviction for deportation purposes. See Matter of Golshan, Interim Decision 2875 (BIA 1981); Matter of Moeller, 16 I&N Dec. 65 (BIA 1976); Matter of Varagianis, 16 I&N Dec. 48 (BIA 1976); Matter of Tucker, 15 I&N Dec. 337 (BIA 1975), aff'd Tucker v. INS, 551 F.2d 313 (9 Cir. 1977); Matter of Espinoza, 15 I&N Dec. 328 (BIA 1975); Matter of Lindner, 15 I&N Dec. 170 (BIA 1975); Matter of Wong, 12 I&N Dec. 721 (BIA 1968); Matter of Kelly, 10 I&N Dec. 526 (BIA 1964), aff'd Kelly v. INS, 349 F.2d 473 (9 Cir.), cert. denied, 382 U.S. 932 (1965); Matter of A-F-, 8 I&N Dec. 429 (A.G. 1959).

The Oregon statute's applicability is also not restricted to only a small class of offenders. Although the respondent argues that eligibility for expungement of a conviction in Oregon is limited to persons convicted of certain minor offenses, section 137.225(5)(c) extends the provisions of the statute to any crime, whether a felony or misdemeanor, which the court in its discretion elects to expunge. Moreover, although the statute limits eligibility for expungement to persons not convicted of another crime in the previous 10 years, we are not persuaded that this provision renders those to whom relief is available equivalent to first offenders. We therefore conclude that section 137.225 of the Oregon Revised Statutes is not a state counterpart to the federal first offender statute.

We also find no merit in the respondent's argument that he should not be penalized for having been convicted in a state court rather than a federal court where he would have been eligible for treatment as a first offender. 2/ That contention was previously addressed and rejected in Matter of Golshan, supra. We noted there the Attorney General's conclusion in Matter of A-F-, supra, that Congress did not intend to permit aliens convicted of narcotics

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2/ We note the respondent's citation in this regard to the Solicitor General's memorandum included in the Appendix to Matter of Andrade, 14 I&N Dec. 651 (BIA 1974). It should be pointed out that both the Solicitor General's statement and the Motion of Commissioner, which is also part of the Appendix in that case, add the caveat that the positions stated there do not apply to expungement under state laws that do not have a federal counterpart.

violations to escape deportation on the basis of a state procedure authorizing a technical erasure of the conviction. The policy determination set forth by the Attorney General in that case has also received the approval of the courts. See Kolios v. INS, 532 F.2d 786 (1 Cir.), cert. denied, 429 U.S. 884 (1976); Gonzalez de Lara v. United States, 439 F.2d 1316 (5 Cir. 1971); Cruz-Martinez v. INS, 404 F.2d 1198 (9 Cir. 1968), cert. denied, 394 U.S. 955 (1969); Garcia-Gonzales v. INS, 344 F.2d 804 (9 Cir.), cert. denied, 382 U.S. 840 (1965); but see Rehman v. INS, 544 F.2d 71 (2 Cir. 1976). We therefore find the respondent's contentions to be unconvincing and conclude that the expungement of his conviction pursuant to section 137.225 does not eliminate it for purposes of deportation.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Board Member James P. Morris has abstained from consideration of this case.

* U.S. GOVERNMENT PRINTING OFFICE: 1983-381-243:2001